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No.

In the

Supreme Court of the United States

OCTOBER TERM, 1973

73 549

BELL SUPERVISORS PROTECTIVE ASSOCIATION (Not a Labor Organization),

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD
and
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO, and LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA (AND APPENDIX)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

BELL SUPERVISORS PROTECTIVE ASSOCIATION
(Not a Labor Organization),

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD
and
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO, and LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA (AND APPENDIX)

Bell Supervisors Protective Association, Charging Party before the Labor Board, prays that a Writ of Certiorari issue to review the judgments (2a, 3a, *infra*) of the United States Court of Appeals for the District of Columbia Circuit in its Causes No. 71-1559 and 71-1785, consolidated for all purposes in that Court on October 28, 1971, which judgments:

(a) set aside that portion of a National Labor Relations Board order in Labor Board case 13-CB 2890 ruling that

union fines against supervisors who worked during a strike against Illinois Bell Telephone Company were an unfair labor practice under Section 8(b)(1)(B) of the Act (p. 2a, *infra*), but

(b) Affirmed the Board's unexplained approval of the action of its Trial Examiner in refusing to amend the complaint at the hearing to allege that the compulsory membership clause which compelled the supervisors to maintain union membership in a commingled bargaining unit of "employees" and "supervisors" was not authorized by the proviso to Section 8(a)(3) of the Act permitting compulsory unionism of "employees" in an appropriate bargaining unit.

Case No. 71-1785 was originally filed in the Seventh Circuit by Bell Supervisors Protective Association to review the order of the Labor Board. Case No. 71-1559 was filed by International Brotherhood of Electrical Workers, AFL-CIO and its Local 134 in the District of Columbia Circuit approximately an hour earlier to review the same order. The Seventh Circuit case was transferred to the District of Columbia and resulted in the order, made on the Board's motion, consolidating the two petitions for review for all purposes (p. 1a, *infra*). That order has not been vacated.

A panel of the District of Columbia Circuit on September 22, 1972 (one judge dissenting), affirmed the Labor Board in its entirety. Thereafter on June 29, 1973 on a Rehearing *en banc*, the Court, by a 5-4 vote, reversed the Labor Board as to the fines and held them lawful.

On the Rehearing, this *Illinois Bell* case was consolidated for purpose of reargument with one involving a like issue concerning Florida Power & Light Company. Con-

solidated opinions, majority, concurring and dissenting, directed to the fines issues in both the *Illinois Bell* and the *Florida Power* cases, were issued.[1]

When this (*Illinois Bell*) case was before the Labor Board, it had been consolidated for purpose of oral argument with one involving Wisconsin Electric Power Company raising the same union fine issue. In both cases the Board decided that the fines were illegal. The *Wisconsin Electric Power* case went to the Seventh Circuit which, on July 13, 1973, (one judge dissenting), refused to follow the 5-4 *en banc* decision in this case and upheld the Labor Board, relying in part on the original District of Columbia panel decision in this case.

Opinions Below

1. The decision of the Trial Examiner appears at p. 4a of the Appendix hereto.

2. The decision of the National Labor Relations Board is 192 NLRB No. 17, 1971 CCH NLRB ¶ 23282. It appears at p. 26a of the Appendix hereto. The Board's decision in the *Wisconsin Electric Power* case, portions of which are adopted in its opinion here, is 192 N.L.R.B. No. 16, 1971 CCH NLRB ¶ 23280.

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[1] A single judgment (p. 3a, *infra*) covering both *Illinois Bell* and *Florida Power* was entered although these cases had been consolidated only for purposes of reargument.

The reason District Judge Matthews, who was on the panel that first decided the *Illinois Bell* case, did not sit at the reargument is not known to this party. Had she done so the possibility exists that on reargument the court would have been evenly divided.

A separate judgment (p. 2a, *infra*) was entered by the Court of Appeals as to the compulsory membership issue,

3. The slip opinion of the panel of the Court of Appeals for the District of Columbia Circuit has not been officially reported; it is at p. 41a of the Appendix hereto.

4. The *en banc* opinion of the District of Columbia Circuit is ..... F. 2d ....., 71 LC ¶ 13,782, and is at p. 95a of the Appendix hereto.

5. The opinion of the Seventh Circuit in *N.L.R.B.* v. *Local 2150, International Brotherhood of Electrical Workers AFL-CIO (Wisconsin Electric Power Company, Intervenor)* is ..... F. 2d ....., 71 LC ¶ 13,815 and is at p. 166a of the Appendix hereto. (This is not strictly an "Opinion Below" but is included in the Appendix for the convenience of the Court in seeing the conflict between the District of Columbia and 7th Circuits.)

Jurisdiction

The judgments of the Court of Appeals (p. 2a, 3a, *infra*) were entered June 29, 1973. Jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Questions Presented

1. Does a union restrain and coerce an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances in violation of Section 8(b)(1)(B) of the National Labor Relations Act by disciplining foremen-members for performing rank and file employees' work during a lawful strike and for forming a protective association to protect the foremens' believed legal rights?

2. Where the General Counsel does not object, do a Trial Examiner and the Labor Board abuse their authority by refusing a motion that they amend a complaint, to con-

form to the unobjected proof, so as to charge a violation of Section 8(b)(2) of the Act by enforcement of a compulsory membership clause which is illegal under the *proviso* to Section 8(a)(3) in that it covers an inappropriate bargaining unit which commingles "supervisors" and "employees"?

Statutes Involved

NATIONAL LABOR RELATIONS ACT, 61 Stat. 136, 29 U.S.C. §151, *et seq.* Pertinent provisions are at p. 180a of the Appendix hereto.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, 73 Stat. 519 29 U.S.C. 401 *et seq.* Sec. 101(a)(1) is pertinent and is at p. 184a of the Appendix hereto.

Statement of the Case

With minor and, we believe, immaterial differences, the facts of this case, *Florida Power & Light* and *Wisconsin Electric Power* are essentially the same: Foremen (statutory "supervisors" as distinguished from "employees"), of those utilities did rank and file work during strikes by International Brotherhood of Electrical Workers. In *Wisconsin Electric Power,* supervisors held withdrawal cards which exempted them from payment of dues, but left them subject to the union's constitution. In *Florida Power,* union membership was voluntary. In this *Bell Telephone* case the foremen were compelled to maintain union membership. In each of the cases the supervisors were fined by the union for disloyalty to it during strikes.

In each of the cases the Labor Board held the discipline was violative of Sec. 8(b)(1)(B).

In the case at bar the fines were $500 on each foreman who worked during the strike and $1,000 on five who were

instrumental in organizing Bell Supervisors Protective Association. The $1,000 fines have not been paid. An action to collect them is pending in the Circuit Court of Cook County, Illinois.[2]

Reasons Relied On For Allowance of Writ

1. The Courts of Appeal for the District of Columbia and for the Seventh Circuit are in sharp conflict over the important and recurring question of whether a union may discipline supervisor-members who are loyal to their employer during a strike and perform rank and file work.

The Seventh Circuit has expressly declined to follow the majority *en banc* opinion of the District of Columbia; it relies on Judge MacKinnon's earlier panel majority opinion and expresses accord with his dissenting *en banc* opinion.

The Court of Appeals for the District of Columbia is also in conflict with the Sixth Circuit's decision in *N.L.R.B.* v. *Lithographers Locals Nos. 15P and 272,* 437 F. 2d 55 (6 Cir. 1971), holding that a union may not discipline a supervisor for working on "struck work."

This Court has never passed upon the question.

N.L.R.B. v. *Allis Chalmers Mfg. Co.,* 388 US 175 (1967), holding that a union may impose court collectible fines against "employee" union members, does not answer the question for it involved only Sec. 8(b)(1)(A) and did not involve statutory "supervisors".

The conflict between the District of Columbia and Seventh Circuits is placed in unusually sharp focus by the Illinois state court suit to collect the $1,000 fines from five

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[2] *Daniel C. O'Brien et al., etc.* v. *Harold W. Anderson, et al.,* Cir. Ct. Cook County, Illinois, No. MI 104664

Illinois Bell supervisors pending in the Circuit Court of Cook County which court, absent a resolution of the question here, will be forced to decide whether it should follow the law of the Seventh Circuit in which it sits or follow the law of the District of Columbia Circuit expressed in a case to which the Association of which defendants are members was a party.

The conflict between the District of Columbia and the Sixth Circuit is as real if not as dramatic. Although the majority in the *en banc* opinion characterizes *N.L.R.B.* v. *Lithographers Locals Nos. 15P and 272*, 437 F. 2d 55 (6 Cir. 1971), as involving only fines for contract administration (p. 110a, *infra*), the fact is that the supervisors were performing "struck work" so that the true substantive issue there was that posed in the first question presented here. The Sixth Circuit decision is quite contrary to that of the District of Columbia here.

In short, the District of Columbia Circuit says a "supervisor"-member may be disloyal to management during a strike: The 6th and 7th Circuits say that then, more than ever, must a "supervisor"-member be loyal to management.

The question is of recurrent importance because the Board's records indicate that in numerous industries supervisors, for one reason or another, are members of unions or subject to their constitutions.[3] The Board has developed a considerable doctrine that a union cannot fine a supervisor-member for acts done by him in *administering* a collectively bargained contract and the courts have up-

[3] See *Nassau and Suffolk Contractors Association*, 118 NLRB 174, 180, 182 and note 121. See also references to foremen-union memberships in the majority opinion here.

held that doctrine.[4] The question of loyalty to union or to employer during a strike, is more important than loyalty in mere contract administration, for a strike is "part and parcel of the process of collective bargaining" (*N.L.R.B. v. Insurance Agent Int'l. Union*, 361 U.S. 477, 495 (1960)).

Petitioner submits that the documented and tersely worded minority opinion of Judge MacKinnon in the District of Columbia and the similarly blunt majority opinion of Judge Cummings in the Seventh Circuit are attuned to the realities of industrial life and correctly state the law. The *per curiam* opinion in the Sixth Circuit case points out the inapplicability of *Allis-Chalmers* and arrives at the same result although not as expository in nature.

The 50-page length (in slip form) of the majority opinion of the District of Columbia bespeaks its strained and unrealistic nature. The concurring opinion in the District of Columbia, with its emphasis on a believed "underlying Congressional policy on the question of upward mobility in the labor market," is merely idealistic fantasy without a shred of cited support in the legislative history of Taft-Hartley.

Including Judge Matthews' vote in the original panel decision in this case, eight federal judges have held strike fines against supervisors are illegal; six have arrived at a contrary result.

Whatever the correct substantive answer to the question may be, the Board, employers, unions and particularly

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[4] *Meat Cutters Local 81* v. *N.L.R.B.*, 458 F.2d 794; D.C. Cir. 1972; *N.L.R.B.* v. *New Mexico Dist. Coun. of Carpenters*, 454 F. 2d 1116, 10 Cir. 1972; *Dallas Mailers Local 143* v. *N.L.R.B.*, 445 F.2d 730, D.C. Cir. 1971; *N.L.R.B.* v. *Sheet Metal Workers Local 49*, 430 F.2d 1348, 10 Cir. 1970.

supervisors should have this Court's definitive resolution of it because the loyalty dilemma exists in nearly every instance of a strike by a union which has supervisors who are either full members of it or have some relationship to it which supposedly subjects them to its constitution.

2. The second question—whether the Board may avoid deciding whether foremen may be compelled to maintain membership in a rank and file union—is likewise important.

Congress, in the Taft-Hartley amendments, put strong curbs on compulsory unionism as to *anyone* in an employment relationship, permitting such compulsion only if all the conditions of Sec. 8(a)(3) of the Act are met. One of those conditions is that a union shop may be applied only to "an appropriate bargaining unit." A bargaining unit of commingled "employees" and "supervisors" is patently inappropriate; indeed, has been held to be "positively illegal" (*International Typographical Union Local 38* v. *N.L.R.B.*, 278 F.2d 6, 10-11 (1 Cir. 1960); *N.L.R.B.* v. *Jackson Press, Inc.*, 201 F.2d 541, 545 (7 Cir. 1953)).

The basic reason a commingled unit is inappropriate is that it brings about divided loyalty and can be the breeding ground for disloyalty either to the union or to the employer whereas the Taft-Hartley hearings and debates made it clear to Congress that it was in the public interest that supervision be made loyal to management and that *Packard Motor Car Co.* v. *N.L.R.B.*, 330 U.S. 485 (1947) holding that supervisors were "employees" within the meaning of the Labor Act be corrected by legislation.

It is, we believe, a shocking perversion of the letter and of the spirit of the Taft-Hartley amendments to find a court approving the Labor Board's closing its eyes to the precise evil at which Congress aimed a rifle. Avoiding a

question which may be distasteful is not within the permissible limits of sound administrative discretion.

When the complaint and proof, unobjected to, showed all the elements making the Illinois Bell union shop clause illegal, Petitioner, the Charging Party, moved that the Examiner amend the Complaint to allege that therefore the union was in violation of Sec. 8(b)(2) because "[i]t is the Board's duty to exercise [its power to amend a complaint] where * * * a just and full disposition of the case suggest that course." (*N.L.R.B.* v. *Sterling Furniture Co.*, 202 F.2d 41, 44 (9 Cir. 1953)). And the Board (or Trial Examiner) even has authority "to allow an amendment over the objection of the General Counsel." (*Frito Company* v. *N.L.R.B.*, 330 F.2d 458, 465 (9 Cir. 1964)).

The Trial Examiner ruled that it was "inadvisable" (p. 21a, *infra*) to amend the Complaint. However, the fact that the issue may be troublesome is no excuse for avoiding it, for the Board has a duty "to decide material issues" which have been fairly tried, even though not specifically pleaded (*American Boiler Mfgr's Assoc.* v. *N.L.R.B.*, 404 F.2d 547, 556 (8 Cir. 1968).

The Trial Examiner's reasons for avoiding the question on asserted procedural grounds were patently specious because (a) all parties knew that the foremen contended, commencing even before their union trials, that the compulsory clause was illegal; (b) the complaint alleged the enforced membership of the foremen in the commingled unit; (c) the evidence fleshing out the allegations was put in either by counsel for the General Counsel or the unions wholly without objection; (d) the General Counsel did *not* object to Charging Party's suggestion of an 8(b)(2) allegation and, although the form of amendment tendered for the Exam-

iner's consideration *restated* facts alleged by the complaint, it did not, contrary to the Examiner's statement, allege any *new* material facts; (e) neither the unions nor Illinois Bell claimed to have evidence that would avoid the illegality which arises as a matter of law from the plain wording of the contract and from the fact that the foremen were proved to be supervisors and (f) the Charging Party did not seek "to invalidate a contract of many years standing", as erroneously stated by the Examiner, but only to have the illegal compulsory membership clause invalidated. The balance of the contract would be protected by its savings clause. In any event, as Member Murdock pointed out in the dissent in *Nassau & Suffolk*, referred to *post* (118 NLRB at 198), "* * * traditional practices can scarcely provide justification for conduct which violates the law."

The actions of the Trial Examiner and the Board cannot be squared with Rule 15(b) FRCP reading, in relevant part:

> "(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues."

Nor can the action here of refusing an amendment to charge a Sec. 8(b)(2) violation be squared with the Board's decision in *Independent Metal Workers Union, Local No. 1*, 147 NLRB 1573 (1964) in which the action of the same

Trial Examiner in finding, without amendment of the complaint, that the proof, under a complaint alleging only a violation of Sec. 8(b)(1)(A), warranted an order of violation not only of that Section but Sections 8(b) 2 and 3 as well.

As the matter was recently put in *Connell Construction Company, Inc.* v. *Plumbers and Steamfitters Local Union No. 100,* C.A. 5, Aug. 22, 1973, Cause No. 72-1243, "Repeated attempts by an administrative body to avoid resolution of a difficult issue may constitute an abuse of discretion." While the Courts on occasion have affirmed Board decisions not to assert jurisdiction *in a particular case,* this Court has held that the Board cannot withhold consideration and decision of entire categories of employers (*Office Employees International Union* v. *N.L.R.B.,* 335 U.S. 13, 318 (1957); *Hotel Employees Local No. 255* v. *N.L.R.B.,* 358 U.S. 99 (19....); *Cf. Miami Newspaper Printing Pressmen's Union* v. *McCulloch,* 322 F. 2d 933 (D.C. Cir., 1963); *Templeton* v. *Dixie Color Printing Co.,* 5 Cir., 444 F. 2d 1064 (1971)). Here the Board exercised jurisdiction over the case but refused to decide an important question apparent on the face thereof without even purporting to claim that it would not effectuate the purposes of the Act to decide it. The Board should be held to its duty.

That the second question we present is deeply enmeshed and intertwined with the first so that this Court should consider both is shown by the District of Columbia majority's suggestion (p. 139a, *infra*) that Illinois Bell foremen could escape the disciplinary powers of the union by resigning from, but continuing to pay dues to it. Theoretically, such "resigned" foremen would be "members in good standing" *so far as the maintenance of membership clause of the contract is concerned,* but they would not be members

under the union constitution entitled to receive the insurance they would be paying for. The legal legerdemain suggested by the District of Columbia majority, while adroit, scarcely squares with the type of labor-management relations this Court can approve. Congress did not intend that anyone pay forced tribute to a union that did nothing for him and in which he had no rights.

In the District of Columbia Circuit's panel decision in case 71-1785, it is suggested (p. 46a, *infra*) that note 23 to the majority Board panel decision in *Nassau & Suffolk Contractors Association Inc.*, 118 N.L.R.B. 174, can be read as implying Board approval of a union shop in a commingled and, therefore inappropriate, bargaining unit. At issue in *Nassau & Suffolk*, so far as union security was concerned, was whether the union was enforcing an old-fashioned closed shop. The Board said, "Yes." However, on enforcement proceedings in the Second Circuit, the Board's decision was reversed (*N.L.R.B.* v. *Local 138 Int'l U. Operating Engineers*, 293 F.2d 187 (2 Cir. 1961)). A footnote to a reversed Board decision scarcely demonstrates that compulsory membership of foremen in an inappropriate bargaining unit is permissible. Furthermore, the dissenting member of the Board in *Nassau & Suffolk* pointed out (118 N.L.R.B. at 197), "Voluntary bargaining for supervisors in a unit not certified by the Board cannot reverse Congressional policy to exclude supervisors from employee bargaining units."

There were other issues in *Nassau & Suffolk* beside that as to the alleged closed shop. As to some of these, the Board was sustained. One of the points that appears to have been sustained was that, upon assumption a commingled unit would be continued, supervisors could not vote in union elections or participate in its administration.

This palliative remedy of second class memberships for supervisors was enunciated in June 1957. If ever valid, it plainly was outlawed two years later by the Labor-Management Reporting Disclosure Act of 1959, 73 Stat. 519 29 U.S.C. 401 *et seq.* Sec. 101(a)(1) of that Act (29 U.S.C. 411(a)(1)) guarantees that,

> "Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization" etc.

Finally, no party here, Board, Union or Illinois Bell has yet contended that the compulsory membership clause is lawful. All that has been offered, and unfortunately accepted, by the Board and the Court of Appeals, has been evasion.

It is time that the Board's stops, starts and evasions were corrected.

The question will continue to fester unless the writ be granted and the question decided substantively by this Court or remanded to the Board for substantive consideration. The Board had no right to avoid a transparent but serious question on the specious procedural excuses tendered by the Trial Examiner.

• • • •

It is respectfully prayed that the Writ of Certiorari issue.

Respectfully submitted,

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September 20, 1973.

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1559 September Term, 1971

International Brotherhood of Electrical Workers, AFL-CIO, and Local 134, International Brotherhood of Electrical Workers, AFL-CIO,
Petitioners
v.
National Labor Relations Board,
Respondent

United States Court of Appeals
for the District of Columbia Circuit
FILED OCT 28 1971
Nathan J. Paulson
CLERK

No. 71-1785

Mill Supervisors Protective Association (Not a Labor Organization),
Petitioner
v.
National Labor Relations Board,
Respondent

Before: Bazelon, Chief Judge

ORDER

On consideration of respondent's unopposed motion to consolidate Numbers 71-1559 and 71-1785 and of the stipulation of the parties setting forth an agreed upon briefing schedule in compliance with the order filed September 14, 1971 in Number 71-1559, it is

ORDERED that Numbers 71-1559 and 71-1785 are consolidated for all purposes, and it is

FURTHER ORDERED petitioners' briefs and appendix of the parties shall be filed on or before October 29, 1971; respondent's brief shall be filed on or before December 2, 1971; and petitioners' reply brief, if any, shall be filed on or before December 16, 1971.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1785 September Term, 1972

Bell Supervisors Protective Association
(Not a Labor Organization),
Petitioner

v.

National Labor Relations Board,
Respondent

United States Court of Appeals
for the District of Columbia Circuit
FILED JUN 29 1973
HUGH E. KLINE
CLERK

Before: Wright and MacKinnon, Circuit Judges; and *Matthews, United States Senior District Judge for the District of Columbia.

ORDER

IT IS ORDERED AND ADJUDGED by this Court that the order of the National Labor Relations Board on review in the above entitled case is affirmed for the reasons set forth in the opinion filed September 1972.

Per Curiam

*Sitting by designation pursuant to Title 28 U.S.C. §294(a).

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1559 September Term, 1972

International Brotherhood of Electrical Workers AFL-CIO, and Local 134, International Brotherhood of Electrical Workers, AFL-CIO,
Petitioners

v.

National Labor Relations Board .

No. 71-1712
International Brotherhood of Electrical Workers, Locals 641, 622, 759, 820, and 1263,
Petitioners

v.

National Labor Relations Board, Respondent
Florida Power and Light Company, Intervenor

PETITIONS TO REVIEW AND CROSS-APPLICATIONS FOR ENFORCEMENT OF ORDERS OF TH NATIONAL LABOR RELATIONS BOARD

Before: Bazelon, Chief Judge, and Wright, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb and Wilkey, Circuit Judges, sitting en banc

JUDGMENT

These causes came on to be heard by the Court en banc and were argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by the Court en banc, that the orders of the National Labor Relations Board on review herein are reversed and these cas remanded for the reasons set forth in the opinions filed this date.

Per Curiam

Date: June 29, 1973
Opinion for the Court, concurred in by Chief Judge Bazelon and Circuit Jud McGowan, Leventhal and Robinson filed by Circuit Judge Wright.
Concurring opinion in which Circuit Judge McGowan joins, filed by Circuit Judge Leventhal.
Dissenting opinion, concurred in by Circuit Judges Tamm, Robb, and Wilkey filed by Circuit Judge MacKinnon.

TDX—378—70
Chicago, Ill.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO
(ILLINOIS BELL TELEPHONE COMPANY)

and Case 13—CB—2890

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the Respondent Local.

George B. Christensen, Esq., and
John C. Malugen, Esq., of
Chicago, Ill., for the
Charging Party.

Paul J. Furlong, Esq., of
Chicago, Ill., for
the Employer.

Before: Frederick U. Reel, Trial Examiner.

TRIAL EXAMINER'S DECISION
Statement of the Case

This proceeding, heard at Chicago, Illinois, from March 31 through April 3, 1970, pursuant to a charge filed June 10, 1969, and a complaint issued December 31, 1969, arises out of certain fines levied by the Respondent Local and confirmed by the parent, Respondent International, upon certain of their members for either (a) continuing to perform work for their Employer during the course of the Local Union's strike against that Employer or (b) forming and becoming officers in an association (the Charging Party herein), the purpose of which was to furnish assistance and counsel to foremen who worked during the strike. The primary issue in the case is whether the imposition of these fines violated Section 8(b)(1)(B) of the Act, in view of the fact that in each instance the person fined was employed in what is allegedly a supervisory capacity, and allegedly represented his Employer in the adjustment of grievances. Respondents, denying that the persons fined were supervisors or that they adjusted grievances, further contend that in any event, under the circumstances of this case, the fines did not as a matter of law involve the Respondents in violation of Section 8(b)(1)(B).

Upon the entire record,[1] and after due consideration of the briefs filed by General Counsel and each of the Respondents, and of the "Statement" filed on behalf of the Charging Party,[2] I make the following:

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[1] Including documents submitted after the hearing, which are hereby admitted as G.C. Exhs. 22, 23, and 24, and Local 134's Exhs. 14A through I and 15A and B, respectively.

[2] Respondents' motion to strike a phrase from Charging Party's Statement as "scandalous and/or impertinent" is granted as Charging Party consented thereto.

Findings of Fact

I. The Business of the Employer and the Labor Organization Involved

Illinois Bell Telephone Company, herein called the Company, an Illinois corporation with headquarters in Chicago, renders local and long distance telephone service as part of a nationwide telephone system, and is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Respondent Local 134, International Brotherhood of Electrical Workers, AFL-CIO, herein called the Local or the Union, and its parent organization, the Respondent International, are labor organizations within the meaning of Section 2(5) of the Act.

II. The Unfair Labor Practice

A. *Background and chronology*

For many years, long antedating any Federal labor legislation, the Company (or its predecessor) and the Local have had contractual relations, pursuant to which the Local represented the Company's Chicago employees for purposes of collective bargaining. The bargaining unit embraced employees in the "Plant Department," and included, *inter alia*, not only journeymen and apprentices engaged as P.B.X. installers but also persons employed as "P.B.X. Installation Foremen," "Building Cable Foremen," "Test Center Foremen," and "General Foremen." The powers and duties of these "foremen" and the question whether they are "supervisors" within the meaning of the Act are among the litigated issues in this case. The contract provides that all members of the bargaining unit must become and remain members of the Local. As recently as 1959 the contracts in effect between the Local and the Company prescribed monthly wage rates for the various "foremen" listed above. Since May 1959 the contracts did not provide wage rates for those foremen, but did contain a section headed "Working Conditions for General Foremen and Foremen." This provision concerned payment for overtime work and for certain absenses, and

contained a clause stating that an appointment as general foreman could not be made for a period of less than 5 days. Other provisions of the contract, such as, for example, that dealing with vacations, appear applicable to the foremen as well as to journeymen employees.

Between May 8, 1968, and September 20, 1968, the Local was engaged in an economic strike against the Employer. At the inception of the strike the Company informed the foremen referred to above that the Company would like to have them come to work, but that the decision whether to work or to respect the strike was a matter left to the discretion of each individual foreman, and that those who refrained from working during the strike could resume work when it ended without being penalized. The Local held a meeting just before the strike at which the foremen were advised that they would be subject to union discipline if they performed rank-and-file work during the strike. A number of foremen thereupon retained counsel and formed an association (the Charging Party, hereinafter referred to as the Association) to protect foremen who worked during the strike.

During the course of the strike some of the foremen performed rank-and-file work, and some stayed out of work. After the strike the Company in no way discriminated against the latter group, and indeed promoted some of them to higher positions. The Local conducted proceedings against a number of foremen, and imposed fines of $500 on foremen who performed rank-and-file work during the strike and of $1000 each against the five foremen who were instrumental in forming the Association. Most of the fined foremen appealed to the International, which in most instances sustained the action of the Local. During the intraunion proceedings, counsel for the Association assisted the foremen in their defense, in which the accused foremen urged that they were supervisors, that the strike was not in their behalf, that the Local was not seeking to bargain for them, and that the union security clause which compelled their membership in the Local was illegal.

The Local has commenced suit in the Illinois courts to collect some of the fines. Insofar as any of the foremen have paid any part of the fines, the Company has reimbursed them.

B. The status of the foremen as "supervisors" within the meaning of the Act, and their powers with respect to the adjustment of grievances

As noted above, most of the foremen involved in this case were employed as P.B.X. installation foremen, or in work of similar character such as building cable foremen, or general foremen. The record establishes that such foremen were in charge of crews of from 8 to 12 men, that they had power to grant time off to their men, that they scheduled overtime, selected the men who would work overtime, disciplined for tardiness by suspending men or docking their pay, and effectively recommended men for promotion or discharge. Although the Union argues that the testimony establishing these powers was of a vague and general nature, it called no witnesses to deny that the foremen possessed the powers which the company representatives, called as General Counsel's witnesses, ascribed to them.[3] On this record I find that the foremen in question possessed one or more of the powers set forth in Section 2(11) of the Act and are supervisors within the meaning of the Act. See, e.g., *N.L.R.B.* v. *Henry Colder Co.*, 416 F.2d 750, 754, fn. 3 (C.A. 7, 1969))

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[3] General Counsel expressed a readiness to interrogate individual foremen as to their powers and duties. The Trial Examiner prevented him from doing so on the ground that such testimony would be cumulative, but expressly invited counsel for the Local to cross-examine such foremen on that issue, and also to put on testimony on that issue as part of Respondent's case. No such cross-examination was attempted and the Local adduced no testimony on this issue as part of its case.

As to the authority of these foremen to adjust grievances, the contract recites with respect to the grievance procedure that "The employee or his Steward shall first bring the grievance to his Foreman, or other first line supervisor," and that "If the grievance is not settled, it shall then be taken up with the succeeding appropriate levels of supervision . . . ." The contract thus unequivocally provides that the foremen here in question may adjust grievances. Moreover, the testimony adduced by General Counsel establishes that the foremen may adjust grievances arising out of disputes over whether an employee should be paid for certain hours he worked after checking out, or over working conditions (such as excessively cold air-conditioning), or over disciplinary action taken by the foremen, or over overtime allocations he had made. Indeed, the testimony shows that most of the grievances are adjusted informally by the foremen, either by their making the requested adjustment or by their persuading the union representative that the grievance lacks merit. Manifestly, these matters are usually of minor importance, and major issues go on to later stages of the grievance procedure. Nevertheless, I am satisfied on this record that the foremen in question do have power to adjust, and do adjust, grievances. Again the Union's suggestion that the testimony is vague and general is unavailing in the light of the contractual language and the Union's failure to adduce testimony which would diminish the force of the evidence presented by General Counsel.

The foregoing discussion of the powers and duties of the foremen is applicable to all those named in the complaint as having been fined except for three men identified in the complaint as "assistant staff supervisor," and two identified as "engineer." The record establishes that an "engineer" has no supervisory authority and that an "assistant staff supervisor" has no occasion to participate in the adjustment of grievances, and normally has no people working for him. The record further establishes that it is a common practice for the Company to transfer a man

from a job as P.B.X. foreman to that of engineer and back again, and that "assistant staff supervisors" are selected from the ranks of P.B.X. foremen, serve 1 or 2 years as assistant staff supervisors, and then either return to their jobs as P.B.X. foremen or are promoted to district installation superintendents (a supervisory position with power to adjust grievances).

C. *Board decisions concerning a union's power to fine supervisory employees*

A series of recent Board decisions, several of which are now awaiting judicial review, hold that under the circumstances there presented a labor organization violates Section 8(b)(1)(B) of the Act (i.e., restrains or coerces an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances) when it fines supervisory employees who are union members. Insofar as Respondents attack the validity of any or all of these holdings, I must, of course, refer them to higher authority, administrative and judicial, as I am required to follow these precedents in the present state of the law. Insofar as Respondents urge that the instant case is distinguishable, however, it becomes important to set forth, as I understand it, what the Board has heretofore held in this area.

The lead case apparently is *San Francisco-Oakland Mailers' Union No. 18, International Typographical Union (Northwest Publications, Inc.)*, 172 NLRB No. 252. In that case the union fined certain foremen-members [4] because of alleged violations of the contract between the employer and the union. The union also threatened similar action against foremen as a result of "disagreement involving contract interpretations or grievance adjustment." The Board's finding of violation in that case sheds little light on the problem here, for in that case the conduct for which the foreman were fined was directly related to their role as

[4] There, as here, the contract required the foremen to be members of the union.

the employer's representative in the adjustment of grievances are in collective bargaining (which includes, of course, the administration of the contract; see *Conley* v. *Gibson*, 355 U.S. 41, 46).[8]

The next case in this area to come before the Board was *Toledo Locals Nos. 15-P and 272 of the Lithographers and Photoengravers International Union, AFL-CIO (The Toledo Blade Company, Inc.)*, 175 NLRB No. 173. In that case, as here, the foremen involved were required to be members of the union which fined them. The fines in that case were imposed for alleged violations of the contract, in that the supervisors worked on production during a strike, thereby violating two contractual provisions, one limiting the amount of production a supervisor can do, and the other prescribing a miminum crew before any work can be performed. The Board in that case held that the union by imposing the fines violated Section 8(b)(1)(B). The case may be distinguishable from that now before us, for although in both cases the supervisors worked while their union was out on strike, the basis of the Board's holding in the *Toledo* case appears to be that the supervisors were involved in what their union claimed to be violations of the contract, and no such contention is urged here.

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[8] The Board in the *Oakland Mailers* case and in several subsequent cases distinguished *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, on which Respondents place their principal reliance. The Board appears to be of the view that the fining of supervisors stands on an entirely different footing from the fining of rank-and-file members. I note that counsel for the International suggests that I not follow *Blackhawk Tanning Co., Inc.*, 178 NLRB No. 25, because the decision was by a 3-2 majority and "As a realistic matter, it must be recognized that one of the members joining in the 'lead' opinion is no longer on the Board and that the term of the other will be up in two months." I decline to engage in the speculation of counsel, but I call his attention to the dangerous consequences of his thinking as applied to this case, for only two members of the 5-4 majority in *Allis-Chalmers* are still on the Court.

The third case in this area to reach the Board was *New Mexico District Council of Carpenters and Joiners of America; United Brotherhood of Carpenters and Joiners of America (A. S. Horner, Inc.)*, 176 NLRB No. 105. In this case one Wilson, a supervisor and a union member, signed a letter, also signed by the company president, urging the employees to vote against the union in a representation election. The Board held that by imposing a fine on him for this conduct the union violated Section 8(b)(1)(B). Manifestly Wilson's act in urging the employees to vote against the union was not itself directly related to contract interpretation, the adjustment of grievances, or any subject of collective bargaining. However, the Trial Examiner's decision, adopted by the Board, states:

> By preferring the charges and imposing a fine upon Wilson, Respondents were attempting to force the Company to change its selected representative for the purposes of collective bargaining and the adjustment of grievances from a representative of management's viewpoint to a person subservient to the will of Respondents. The Council itself explained it was fining or bringing charges against Wilson because he placed the Company's interests above those of Respondents. Sizemore in his letter to the General Executive Board of the United Brotherhood stated that Superintendent Wilson's loyalty "must be to the Union." It is clear that Respondents preferred charges against and fined Wilson as a means of disciplining him because he placed the interests of the Company above those of Respondents. This was obviously coercion against the Company because it would tend to require the Company to retain as representatives for collective bargaining and adjustment of grievances only individuals who were subservient to Respondents. That the Company and Respondents had no labor agreement does not detract from this finding. Wilson could and did adjust grievances. Respondents were forbidden by the Act

to dictate to the Company whom it should select to adjust employee grievances. Respondents' actions "were designed to change the [Company's] representatives from persons representing the viewpoint of management to persons responsive or subservient to Respondents' will. In enacting Section 8(b)(1)(B) Congress sought to prevent the very evil involved herein—union interference with an employer's control over its own representatives. [Citation] That Respondent[s] may have sought the substitution of attitudes rather than persons, and may have exerted [their] pressure upon the [Company] by indirect rather than direct means. cannot alter the ultimate fact that pressure was exerted here for the purpose of interfering with the [Company's] control over its representatives. Realistically, the [Company] would have to replace its [superintendents] or face *de facto* nonrepresentation by them." *San Francisco-Oakland Mailers' Union No. 18.* 172 NLRB No. 252.

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By fining Wilson, Respondents did so because he chose to act as a management representative, which he was.

In a subsequent case involving the same employer and the same union, reported at 177 NLRB No. 76, the Board again found a violation of Section 8(b)(1)(B). In this case the union fined a supervisor for continuing to work for an employer who was not under contract with the union. This case is plainly distinguishable from that before us, as the union's position in the second *Horner* case was that the supervisor must leave his employment altogether.

Likewise distinguishable is still another New Mexico case. *Sheet Metal Workers' International Association, Local Union 49, AFL-CIO (General Metal Products, Inc.),* 178 NLRB No. 24, where the Board found a violation of Section 8(b)(1)(B) in the union's fining of a supervisor for performing work in violation of the contract between

the union and the employer. The holding in that case that the union "attempted by its internal disciplinary procedure to circumvent the contractual procedures for settlement between the parties of a contractual grievance" does not apply to the instant case. Similarly two recent Board holdings in this area, *Dallas Mailers Union, Local No. 143A and International Mailers Union (Dow Jones Co.)*, 181 NLRB No. 49, and *Houston Typographical Union No. 87 (Houston Shopping News Co.)*, 182 NLRB No. 91, are distinguishable. In the *Dallas* case the union expelled a supervisor because of an order he gave a nonsupervisory employee, which the latter charged was discriminatory and improperly motivated. Manifestly, the supervisor was exercising his supervisory authority, and as the Board stated, "His expulsion will also be a clear signal to other foremen, who are, under the established practice, members of the Union, that they could be subject to similar discipline if they administer the contract in a manner so as to incur the Union's displeasure." In the *Houston* case the union fined a supervisor-member for what it regarded as his failure to observe hiring procedures required under the contract. The fine, in the Board's view, was designed to make the supervisor "more amenable to [the union's] interpretation of how the contract should be applied. . . ." The rationale in the *Dallas* and *Houston* cases has no application here.

Finally, in *Local Union No. 453, Brotherhood of Painters, etc. (Syd Gough & Sons, Inc.)*, 183 NLRB No. 24, the Board affirmed Trial Examiner Sherman's dismissal of a complaint which alleged that a union violated Section 8(b)(1)(B) by fining a supervisor for working at a particular jobsite without notice to the union. The Trial Examiner in that case noted that the only purpose of the "notice" requirement was to facilitate the union's administration of its hiring hall and the collection of certain assessments. He concluded that "unless the Board is prepared to say that the fining of a supervisor by a union for whatever reason, including, for example, late

payment of dues or disruption of a union meeting, tends to impair his effectiveness as an employer representative, it is not clear how the fine imposed . . . for alleged noncompliance with Respondent's registration requirement may be held to violate Section 8(b)(1)(B)." The Board in affirming the dismissal did not pass upon the Trial Examiner's analysis of the other cases in this area but contented itself with rejecting, as unsupported by the evidence, General Counsel's contention in that case that the union's motivation was to retaliate against the employer for the latter's filing of charges against the union. So far as here relevant the *Gough* case appears to stand for the proposition that the mere fining of a supervisor does not establish a *per se* violation of the Act.

D. *Conclusions with respect to the legality of the fines*

As the discussion in the foregoing section indicates, most of the Board's holdings in this area concern discipline which a union directed at supervisory employees because of action by the supervisor directly related to matters of contract construction or the discharge of supervisory functions. Those cases are readily distinguishable here where the action for which the supervisors were fined bore no direct relation to their work as supervisors or to any interpretation of the contract. As an original proposition I would be inclined to construe Section 8(b)(1)(B) as interdicting union fines of supervisors only when the conduct for which the supervisor was fined bore some relation to his role as a representative of management in "collective bargaining or the adjustment of grievances," to quote Section 8(b)(1)(B). In the instant case the question confronting the supervisors whether to work or to respect the strike call of their Union was in no way related to those subjects. Moreover, the Company itself had made it clear that it was not demanding that its supervisors work during the strike. On the contrary, the Company expressly left the decision up to each individual supervisor, with specific

assurances that no reprisal would be visited on those who chose not to work. After the strike the Company promoted some of the supervisors who had not worked during the strike. I therefore find some difficulty in concluding that the Company was restrained or coerced by the Union's action in fining the supervisors who worked, or even in finding that the Union's action had any natural or inherent tendency to restrain or coerce the Company. (Undoubtedly the fines tended to restrain or coerce the supervisors, but that is not the violation charged. Also, it is no part of this case to decide whether the fines were lawful or proper under the Union's constitution or under any provision of statute or common law other than Section 8(b)(1)(B) of this Act.)

The Board in the first *Horner* case (176 NLRB No. 105), however, did not limit the scope of Section 8(b)(1)(B) along the lines I have indicated. In that case the supervisor was fined because he signed a letter urging the employees to vote against the union. Such conduct on his part bore no discernible relationship to his role as a representative of management in collective bargaining or the adjustment of grievances. Indeed, the conduct of the supervisors in the instant case in working during the strike seems far more directly related to furthering the legitimate aims of management, and far more directly related to the normal obligations of a supervisor, than the conduct of the supervisor in *Horner*. But the Board in that case found that the union by fining the supervisor violated Section 8(b)(1)(B), adopting without comment the Trial Examiner's observations quoted above. The respect which I am compelled to pay the Board's holding in that case requires me to find a similar violation here. See *St. Louis Typographical Union No. 8, (Graphic Arts Assn. of St. Louis)*, 149 NLRB 750, 758-759.

What has been said above deals with the fines for performing work during the strike. Five men were fined for organizing the Bell Supervisors Protective Association.

They undertook this action "on their own" and it did not directly redound to the benefit of the Company. It may well be argued that to find a violation of Section 8(b)(1)(B) in these five instances is to go even beyond the first *Horner* case, where the supervisor affixed his signature to a letter also signed by a company official, and urged employees to reject a union with which the company might have had to bargain. Not even *Horner* goes so far as to hold that any fine a union imposed on a supervisor violates Section 8(b)(1)(B), and the recent *Gough* decision appears to foreclose any such argument.

If, to use the hypothetical case I suggested at the hearing, the union fined supervisors for resigning from the union's bowling league and forming one of their own, I would have some difficulty in discerning an infringement of the protection the statute gives employers in Section 8(b)(1)(B). In the actual case before us, however. the Bell Supervisors Protective Association arose out of relations among the supervisors, *the Company*, and the Union, and not (as in the bowling example) out of relations solely between the supervisors and the Union. The Association was formed because the Union threatened to fine supervisors for working during the strike, and to protect or aid those who desired to work. As the Association had its inception as a response to what is here found to be illegal union conduct, it is not unreasonable to extend the finding of illegality to cover the Union's fines relating to the Association. Although the Company was not a party to the creation of the Association, the relationship of the supervisors to the Company underlies the creation of the Association just as it underlies the action of the supervisors in working during the strike. To separate the two sets of fines would be highly legalistic and unrealistic, a practice on which the Board has properly frowned on past occasions, prefering to treat situations "as a whole." See, e.g., *Curtis Mathes Mfg. Co.*, 145 NLRB 473, 475-476, overruling the finding at 482; *Pittsburgh Reflector Company*, 177 NLRB No. 57. Moreover, as I

understand the hospitable scope which the Board gave Section 8(b)(1)(B) in the first *Horner* case, a union violates that section when it fines a supervisor for any conduct in which the supervisor engages which tends to further the interests of the employer.[4] Here the Association tended to further the Employer's interest by helping protect supervisors who desired to work during the strike.

There remains for consideration the case of the five men (two engineers and three assistant staff supervisors) who apparently had been and would again be in the supervisory category but who were removed therefrom—perhaps for as long as 1 or 2 years—and were not "supervisors" at the time the Union fined them (and presumably at the time of the strike) and had nothing whatsoever to do with "collective bargaining or the adjustment of grievances." General Counsel relies on the language approved by the Board in *Toledo Blade, supra,* finding a violation when the person disciplined was merely a "natural, possible, future choice of the employer to handle its grievances as occasion might arise. . . ." But in that case those words were applied to a supervisor who had "present substantial other supervisory authority and regular contact with the employees under him. . . ." The Company may well feel that it desires to reimburse these nonsupervisors who were fined by the Union, and the legality of the fines may be questioned in other proceedings and on other grounds. On the narrow issue before me, however, I cannot find any restraint or coercion of the Company in its selection of representatives for collective bargaining or adjustment of grievances in the Union's fining of nonsupervisors who are not concerned with those subjects. To be sure, if they are thereafter returned to supervisory positions with power to adjust grievances they will have felt the force of the Union's authority.

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[4] The narrow holding in the *Gough* case falls within this generalization, as the supervisor's failure to register was in no sense in the employer's interest.

The same, of course, would be true of any employee who had been fined by the Union and later achieved supervisory status. But, under the views heretofore expressed, the supervisors would be protected against union fines for strikebreaking as supervisors, and I see no need, so far as the statutory purposes are concerned, to extend the protection at other times. In any event I find that the Union is not violating Section 8(b)(1)(B) insofar as it fines persons who are not, at the time of the conduct for which they are fined, supervisory employees, and are not, and in their then existing jobs cannot be, engaged in collective bargaining or in the adjustment of grievances. The first *Horner* case may require me to stretch the statute beyond what I would otherwise consider the breaking point, but it hardly justifies ignoring the statute altogether.

Finally, insofar as a vice president of the International or its president affirmed the action of the Local in imposing fines heretofore found to have been illegally levied, the International ratified the action of the Local, and therefore likewise violated Section 8(b)(1)(B). This result follows even in those cases where the International did not pass on the merits but found the appeal procedurally deficient, for the International should have held all the fines to be illegally imposed.[1] As the record shows that the International has not collected or attempted to collect any fines, its liability to reimburse the fined employees should be considered secondary to that of the primary violator, the Local. *Makela Welding, Inc.*, 159

[1] I am aware of the general rule, as stated at 74 A.L.R. 2d 783 at 800, that "where the only action taken by the national union was in the nature of an appellate review of the local's action, the national union has been held not answerable in damages to a wrongfully suspended or expelled member." In my judgment this general principle should not govern a case where the International, by its review, sustains a fine imposed in violation of a Federal law after the validity of that fine under that law is placed, in issue before it.

NLRB 964, 973, enfd. 387 F.2d 40 (C.A. 6, 1968); see also the *Lexington Electric* case there cited.

E. *Procedural rulings*

The Local subpoenaed certain records of the Association and certain notes or memoranda from the Company. I granted motions to revoke both subpoenas for reasons set forth in the transcript and the pertinent exhibits and I see no need to repeat those reasons here.

At the conclusion of the hearing the Charging Party filed a document entitled a motion "for Amendment to Conform Pleadings to Proof with Respect to the Union Shop Contract Proved in this Case." Counsel for the Charging Party disclaimed any power on its part to amend the complaint, but pointed out that such power resides in the Trial Examiner and in the Board, citing *Frito Company* v. *N.L.R.B.*, 330 F.2d 458 (C.A. 9, 1964). The avowed purpose of the amendment was to challenge the legality of the contract between the Company and the Local on the ground that the unit is inappropriate because it includes supervisors, and that the union-security clause is therefore illegal for failure to meet the requirement of Section 8(a)(3)(i). This was the precise contention advanced by the same Charging Party in Case 13-CA-8451, in which the General Counsel sustained the refusal of the Regional Director to issue a complaint. In a posthearing memorandum in support of the motion, the Charging Party pointed out that all the facts necessary to sustain its allegation (the provisions of the contract and the supervisory status of the foremen included in the unit) were established on this record.

I denied the motion to amend. Most of the cases relied on in support of the motion present the situation in which all parties were on notice throughout the litigation of all the facts alleged to constitute a violation of law, but the complaint failed to allege violations of all the proper subsections of the Act. Here the amendment offered by the Charging Party would of necessity add factual alle-

gations to the complaint as well as new subsections to the list of those violated. The *Frito* case holds only that the Trial Examiner and the Board have statutory *power* to consider the validity of contractual provisions fully litigated although not alleged as violative of the Act; the case does not hold that the Board is *compelled* to do so.

In the instant case, assuming the existence of power to pass on the issue tendered by the Charging Party at the close of the hearing, I think it inadvisable to do so. Among other considerations, I note that the effect of sustaining the Charging Party's position would be to invalidate a contract of many years' standing without any notice to either of the contracting parties, until the conclusion of the hearing, that the validity of their agreement was in issue. Cf. *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 232-235. I also note that the condition which the Charging Party urges is illegal (a union-security agreement) in a bargaining unit which includes supervisory and nonsupervisory employees) has apparently been characteristic of several cases recently before the Board, without any intimation from that agency that it finds anything irregular in such a situation. I doubt the wisdom of deciding so far reaching a question which enters this litigation only by the back door, as it were.

The Charging Party is, of course, free to assign this ruling as error and to pursue it before the Boad. I would respectfully suggest that if the Board is disposed to consider the matter on its merits, the other parties (Union, Company, and General Counsel) should be invited to submit supplementary briefs thereon. I would also assume that if the Board affirms my denial of the motion and the Charging Party presses the issue on judicial review, the court if it found procedural merit in the Charging Party's position would remand the issue to the Board to ascertain its substantive views. Cf. *Laclede Gas Co.* v. *N.L.R.B.*, 421 F.2d 610, 617 (C.A. 8, 1970).

Conclusions of Law

1. Persons employed by the Company as general foremen, P.B.X. installation foremen, test center foreman, building cable foremen, or district installation superintendents are supervisors within the meaning of Section 2(11) of the Act.

2. Persons employed by the Company as engineers or as assistant staff supervisors are not supervisors within the meaning of the Act.

3. By fining supervisors, as described in the first conclusion of law stated above, for engaging in productive work during the strike or for forming the Bell Supervisors Protective Association, Respondent Local engaged in an unfair labor practice affecting commerce within the meaning of Sections 8(b)(1)(B) and 2(6) and (7) of the Act.

4. Respondent International, insofar as it, acting through any of its officers, sustained the fines described in the preceding conclusion of law, engaged in the same unfair labor practice.

The Remedy

I shall recommend that Respondents cease and desist from their unlawful conduct, and that they make the unlawfully fined supervisors whole by rescinding the fines, expunging all records thereof, and refunding to the Company (which has already reimbursed the supervisors) the amount of the fines they have paid. The monetary liability for refunding the fines shall fall in the first instance on the Local, with secondary liability on the International. I shall further recommend the posting of a notice signed by officers of both Respondents.

Accordingly, upon the foregoing findings and conclusions, and upon the entire record in the case, I recommend, pursuant to Section 10(c) of the Act, issuance of the following:

ORDER*

Respondents International Brotherhood of Electrical Workers, AFL-CIO, and its affiliated Local 134, and their respective officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Fining supervisory employees of the Illinois Bell Telephone Company, whose duties include representing that Company in collective bargaining or in the adjustment of grievances, for engaging in productive work during the course of a strike or for activities directly related thereto such as forming or participating in an organization designed to protect supervisors who work during a strike.

(b) In any like or related manner restraining or coercing the aforesaid Employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Rescind, and expunge all records of, the fines levied against supervisory employees for having engaged in productive work during the 1968 strike or for having participated in the formation of the Bell Supervisors Protective Association.

(b) Reimburse the Illinois Bell Telephone Company for any and all sums paid by it pursuant to the fines referred to in the preceding paragraph, and advise in

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*In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

writing each employee against whom such fines were levied that the fines have been rescinded, that the records thereof have been expunged, and that the Company has been reimbursed; provided: that the action required in this subparagraph shall be primarily required of the Respondent Local, and shall be required of Respondent International only to the extent that Respondent Local shall fail to give the written notices and pay the sums herein required.

(c) Post at its business offices, meeting halls, and all other places where notices to members of the Local are customarily posted, copies of the attached notice marked "Appendix." * Copies of said notice, on forms provided by the Regional Director for Region 13, shall, after being duly signed by representatives of the Respondents, be posted by the Respondents immediately upon receipt thereof, and be maintained by them for a period of 60 consecutive days thereafter. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(d) Furnish the Regional Director for Region 13 signed copies of said notice for posting by Illinois Bell Telephone Company, if willing, in places where notices to employees are customarily posted. Copies of said notices, on forms provided by the Regional Director, shall, after being signed by the Respondents, be forthwith returned to the Regional Director for disposition by him.

(e) Notify the Regional Director for Region 13, in writing, within 20 days from the date of the receipt of

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* In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

this Decision and Recommended Order, what steps they have taken to comply herewith.[10]

Dated at Washington, D.C. June 29 1970

APPENDIX
NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT fine or otherwise discipline supervisory employees of Illinois Bell Telephone Company (such as, for example, P.B.X. installation foreman) for engaging in productive work during a strike or for participating in any organization designed to counsel and protect such supervisors in the event they work during a strike.

WE WILL NOT in any like or related manner restrain or coerce Illinois Bell Telephone Company in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances.

WE WILL rescind, and expunge from our records, the fines levied against supervisory employees for working during the 1968 strike or for having formed the Bell Supervisors Protective Association.

WE WILL refund to the Illinois Bell Telephone Company the sums it has paid pursuant to the fines we levied against supervisors in connection with the 1968 strike.

WE WILL advise in writing each of the supervisors fined in connection with the 1968 strike that his fine has been rescinded and expunged, and that we have reim-

[10] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith."

bursed the Company for any sums it paid pursuant to those fines.

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

.....
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

.....
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 881 U.S. Courthouse and Federal Office Bldg., 219 S. Dearborn Street, Chicago, Illinois 60604, Telephone 312-353-7575.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

International Brotherhood Of
Electrical Workers, AFL-CIO,
And Local 134, International

Brotherhood Of Electrical Workers, AFL-CIO (Illinois Bell Telephone Company)
and
Bell Supervisors Protective Association (Not a Labor Organization)

DECISION AND ORDER

On June 29, 1970, Trial Examiner Frederick U. Reel issued his Decision in the above-entitled proceeding, finding that the Respondents have engaged in and were engaging in certain unfair labor practices within the meaning of the Act, and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, both Respondents (hereinafter referred to as Respondent International and Respondent Local) and the Charging Party herein referred to as the Association) filed exceptions to the Decision and supporting briefs. The General Counsel has filed a brief in support of the Trial Examiner's Decision, cross-exceptions to the Trial Examiner's Decision, and an answering brief to the Respondent International's exceptions.

On September 2, 1970, the National Labor Relations Board, having determined that the instant case raised issues of substantial importance in the administration of the National Labor Relations Act, as amended, ordered that this case be consolidated with one other[1] for the purpose of oral argument before the Board. On October 5, 1970, these cases were argued orally before the Board.

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[1] *Local Union No. 2150, International Brotherhood of Electrical Workers, AFL-CIO (Wisconsin Electric Power Company)*, 192 NLRB No. 16, issued this day.

The Board[2] has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, the oral arguments, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner to the extent consistent with our Decision and Order.

Illinois Bell Telephone Company, hereinafter referred to as Illinois Bell, or its predecessors and Respondent Local have maintained a contractual relationship since 1909. Respondent Local represents Illinois Bell's Chicago employees in the "Plant Department," including not only journeymen and apprentices employed as PBX installers but also persons employed as "P.B.X. Installation Foremen," "Building Cable Foremen," and "General Foremen."[3] According to the terms of the collective-bargaining agreement all members of the bargaining unit, includ-

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[2] Member Ralph E. Kennedy, who succeeded to the Board after the oral argument presented by the parties, has reviewed the entire record in this case including the arguments advanced during oral argument and is participating in the disposition of this case.

[3] Article 11, section 1(a) and exhibit A of the 1968-71 and all prior collective-bargaining agreements since 1948 provide in pertinent part:

ARTICLE II, section 11

(a) This Agreement covers all those employees of the Company in the group represented by Local Union No. 134, whose titles are included in Exhibit "A". . . . .

* * * * *

Exhibit A

Wage Group Number 1

General Foremen

* * * * *

Wage Group Number 2

PBX Installation Foremen

Building Cable Foremen

ing the above-named foremen, must become and remain members of Respondent Local.[4]

At one time the collective-bargaining agreement between the parties prescribed the monthly wage rates for the "foremen" listed above. However, in recent agreements no wage provisions have been included but the agreement includes a section entitled "Working Conditions for General Foremen and Foremen" which concerns payment for overtime work and for certain absences. Another contract clause provides that the appointment of general foremen may not be made for a period of less than 5 days. Further, other evidence in the record shows that when Illinois Bell recently revised its foremen overtime schedule it requested the concurrence of Respondent Local.

Between May 8, 1968, and September 20, 1968, Respondent Local engaged in an economic strike against Illinois Bell. At the inception of the strike, Illinois Bell informed the foremen that although it would like to have them come to work the decision whether to work or to respect the strike was a matter of personal discretion, and that those who chose not to work would not be penalized. On the other hand, at a Respondent Local union meeting just prior to the strike a representative of Respondent Local, in response to a question warned that it would be the policy of the Union to discipline any foremen who performed rank-and-file work during the strike. It appears that a large number of the foremen were present at this meeting and heard the Union's warning. Thereafter, in response to the Respondent Local's warning, several foremen formed the Bell Supervisors Protective As-

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[4] Article III, section 1 of the 1967-71 and all prior collective-bargaining agreements since 1948 provide in pertinent part:

> All employees with thirty days or more of employment with the Company, who are represented by Local Union No. 134 shall become and remain members of Local Union No. 134 in good standing as a condition of employment under this agreement. . . . .

sociation and through it retained counsel to protect the rights of those foremen who chose to work during the strike.

During the course of the strike some of the foremen continued to report for work and performed rank-and-file work, and other foremen stayed away from work. After the strike Illinois Bell in no way discriminated against the latter groups, and indeed promoted some of them to higher positions.

The record reveals that Respondent Local thereafter carried out its earlier announcement and commenced union proceedings against a number of foremen, and imposed fines of $500 on foremen who performed struck work and $1,000 fines against each of five foremen who were instrumental in forming the Association. Most of the fined foremen appealed to the International, which, except where there was procedural irregularity, sustained the fines. Both at the proceedings before the Local and on the appeal to the International it was urged by the foremen that the union-security clause which compelled them to remain members of Respondent Local was illegal. Illinois Bell has reimbursed these foremen for the full amount of the levied fines which they paid.

The Trial Examiner concluded that the Respondent Local, by imposing on foremen[8] possessing the power to

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[8] The Respondents have excepted to the Trial Examiner's finding that foremen and general foremen were "Employer representatives." The record clearly shows that the foremen and general foremen do actually participate in the adjustment of grievances and therefore are, for the purposes of Sec. 8(b)(1)(B), "Employer representatives." The Trial Examiner has, however, refused to find that persons occupying the positions of assistant staff supervisor and engineer are "Employer representatives" for the purposes of Sec. 8(b)(1)(B). We agree with the Trial Examiner. The three assistant staff supervisors occupy nonsupervisory positions and do not have contact with the grievance adjustment procedure. It is true that these

adjust grievances fines for crossing the Respondent Local's picket line and performing struck work, violated Section 8(b)(l)(B) of the Act. He reasoned that the Respondent Local's acton impinged on the loyalty which Illinois Bell should be able to expect from its supervisors who are the "Employer's representatives" for the adjustment of grievances and therefore restrained and coerced Illinois Bell in violation of Section 8(b)(l)(B) of the Act. The Trial Examiner also found that the Respondent Local violated Section 8(b)(l)(B) by fining the supervisor-organizers of the Association since, although not sponsored by the Company, it was part and parcel of the overall attempt by the Respondent Local to restrain and coerce Illinois Bell in the selection of its representatives for the adjustment of grievances. Finally, the Trial Examiner concluded that Respondent International also violated Section 8(b)(l)(B) by affirming, on appeal, the imposition of those fines by the Respondent Local.[4]

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[3] (continued)
persons were formerly foremen and expect to be returned to the supervisory hierarchy in a year or two. However, it is clear that the Company has no immediate expectation of having these persons represent it in collective-bargaining and grievance adjustment. Further, the record, although sparse, clearly shows that the two engineers occupy nonsupervisory staff positions with duties which do not include participation in the collective bargaining and the adjustment of grievances. See *Toledo Locals Nos. 15—P and 272 of the Lithographers and Photoengravers International Union, AFL-CIO (The Toledo Blade Company, Inc.)*. 175 NLRB No. 173, enfd. 437 F.2d 55 (C.A. 6).

[4] The International has excepted to the Trial Examiner's finding that it violated Sec. 8(b)(l)(B) by affirming Local 134's fining of the union member supervisors for doing struck work. It argues that it should not be held liable for its purely appellate review of the local's fines. The International asserts there is a common law principle which provides that an international union is not answerable in damages to a wrongfully suspended or expelled member

We agree with these findings of the Trial Examiner. The Union in this case, as the union in *Local Union No. 2150, International Brotherhood of Electrical Workers, AFL—CIO (Wisconsin Electric Power Company)*, 192 NLRB No. 16 issued this day, fined union member supervisors for doing the work of the rank-and-file union members during the course of a strike against Illinois Bell. We find no discernible difference between the two cases, and for the reasons set forth in that case, we find that, in the instant case, the Union violated Section 8(b)(1)(B) by fining union member supervisors for doing struck work since

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[6] (continued)
when its only action taken was in the nature of an appellate review of the local's actions. The two New York common law cases, *People ex rel. Solomon* v. *Brotherhood of Painters, Decorators & Paperhangers*, 218 N. Y. 115, 119 N.E. 725 (1916), and *Schouten* v. *Alpine*, 215 N.Y. 225, 109 N.E. 244 (1915), cited for this principle are inaposite. Here, unlike those cases, the International affirmed an appeal of fines which "on their face" were violative of the Act. Further, those who appealed the fines in this case specifically raised the question of whether the fines were legal under the statute. *United Brotherhood of Capenters (Endicott Church Furniture Inc.)* v. *N.L.R.B.*, 286 F.2d 533 (C.A.D.C., 1960), also relied upon by the International, involves, in part, the court's refusal to find an international union in violation of the Act because it approved work rules which could have been applied in a legal manner rather than, as they were applied, in an illegal manner. Here the fines "on their face" were unlawful and this situation was argued vigorously to the International by the supervisors when they made the appeal.

In the light of the above, we agree with the Trial Examiner, for the reasons set forth in his Decision, that in this case it was clear that the International, by its review, sustained fines imposed in violation of a Federal law after the validity of these fines under that law had been placed in issue before it and thereby violated Sec. 8(b)(1)(B) of the Act.

the underlying dispute giving rise to the fines was between the Union and Illinois Bell rather than between the Union and its supervisor-members.

The Trial Examiner has also found that the Union violated Section 8(b)(l)(B) by fining five supervisors for organizing the Bell Supervisors Protective Association. We agree, for the reasons set forth in the Trial Examiner's Decision, that while the Company, was not active in the formation of the Association, the creation of the Association was for the purpose of protecting the rights of those supervisors who were fined unlawfully for doing struck work which furthered the interests of the Company. Consequently we conclude, as did the Trial Examiner, that the fining of the supervisors for forming the Association must be considered as part of the Union's overall effort to coerce and restrain the Employer in selecting its representatives.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act as amended, the National Labor Relations Board adopts as its own the recommended Order of the Trial Examiner, as herein amended and orders that the Respondents, International Brotherhood of Electrical Workers, AFL—CIO, and Local 134, International Brotherhood of Electrical Workers, AFL-CIO, their officers, agents, and representatives, shall take the action set forth in the Trial Examiner's recommended Order, as herein modified:

1. Delete paragraph 2(b) and substitute the following:

"Reimburse the supervisory employees for any and all sums paid by them pursuant to the fines referred to in

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[1] It is not the purpose of the Board to become involved in private arrangements made between individual supervisors Illinois Bell about how the union-imposed fines were to be. It is clear that the fines were assessed against the supervisor individually and therefore we shall follow our customary practice and direct that the Union reimburse the supervisor rather than Illinois Bell.

the preceeding paragraph, and advise in writing each supervisor against whom such fines were levied that the fines have been rescinded and that the records thereof have been expunged; provided: that the action required in this subparagraph shall be primarily required of the Respondent Local, and shall be required of Respondent International only to the extent that Respondent Local shall fail to give written notices and pay the sums herein required."

2. Substitute the attached notice for the Trial Examiner's notice.

Dated, Washington, D.C. Jul. 14, 1971.

Edward B. Miller, Chairman
Howard Jenkins, Jr., Member
Ralph E. Kennedy, Member
National Labor Relations Board

Member Fanning, dissenting:

At issue herein is whether restraints imposed on supervisors by their union for their performance of duties not related to their supervisory functions constitute "restraint and coercion" of their employers within the meaning of Section 8(b)(1)(B).

The relevant facts may be summarized briefly as follows: Prior to a strike called by Respondent Union, a membership meeting was held by Respondent at which members who held supervisory positions were advised that they would be subject to union discipline if they performed rank-and-file work during the strike. The Employer informed the supervisor-members that it wished to have them come to work to perform rank-and-file work, but that the decision to work was left to their discretion and could be exercised without fear of penalty if they chose not to work. During the course of the strike some supervisor-members performed rank-and-file work; others refrained from working. After the strike, the Employer imposed no penalties for failure to work and, in fact, promoted some

supervisors who had refused to work to higher positions. Respondent, after appropriate proceedings, imposed fines of $500 on supervisor-members who performed rank-and-file work during the strike.

Section 8(b)(1)(B) makes it an unfair labor practice for a labor organization to "restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." Thus, the prohibited practice is the restraint or coercion of the employer, not in any general sense, but solely in the selection of his representatives—not just any representative—but only those who perform collective-bargaining functions or engage in the settlement of grievances. On the facts of this case, it is clear that the Employer felt no restraint or coercion from the Union's action; it left the decision whether to work entirely to the discretion of the individual supervisors, and promoted some who had refused to work. Nevertheless, the law has developed so as to include within the statutory concept of restraint and coercion of an employer, union disciplinary actions which in fact are directed towards compelling a supervisor's allegiance to his union rather than to his employer with respect to his performance of collective-bargaining or grievance-adjustment functions or his performance of duties which are directly related to or which may be said reasonably to grow out of his performance of such functions.[8]

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[8] The cases cited by the majority in support of their decision all involve fines of supervisors imposed by their union because of the manner in which they discharged such functions. I agree with the Trial Examiner that they are distinguishable from the instant case. With respect to the Trial Examiner's view that the decision in the first *A. S. Horner* case (176 NLRB No. 105) compels the result herein, I believe he misconceives the role of the fined supervisor. There the supervisor was fined because he give an antiunion speech during an election campaign. Though the injury to legitimate union objectives is comparable to that flowing from the supervisor's per-

However, to constitute restraint or coercion of the employer in the statutory sense, it is necessary that the restraints imposed on the supervisor must be restraints on his actions in such matters, not on his actions on other matters. For it is only in the denial to the employer of the unrestrained performance of such functions by one whom he has selected for that purpose that the employer can be said to be coerced in the selection of a representative to act in such matters. As the Board said in the *San Francisco-Oakland Mailers* case, "Realistically, the Employer would have to replace its foreman or face *de facto* nonrepresentation by them."[9] If the restraint is imposed upon the supervisor because of his actions in matters unrelated to his general supervisory functions, there is no restraint upon the employer with respect to his selection of representatives to perform such functions though he may of course be restrained in the selection of representatives to perform other functions. The Board has in fact recognized this distinction as valid in the *Syd Gough* case[10] where it found no violation of Section 8(b)(1)(B) in a fine of a supervisor (who had grievance-

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[8] (continued)
formance of struck work in this case, the supervisor was performing a normal supervisory function of informing employees of how management preferred to deal with employee grievances and complaints—a system of direct dealing with employees rather than dealing with them through a representative. So viewed, the case may come within the *San Francisco-Oakland Mailers'* decision. However that may be, I did not participate in *Horner* and do not regard myself as bound by its holding.

[9] *San Francisco-Oakland Mailers' Union Local No. 18, International Typographical Union (Northwest Publications)*, 172 NLRB No. 252.

[10] *Local Union No. 453, Brotherhood of Painters, Decorators and Paperhangers of America, AFL—CIO (Syd Gough and Sons, Inc.)*, 183 NLRB No. 24.

adjustment responsibilities) for his failure to register at the union's hiring hall. That decision necessarily stands for the proposition that a union-imposed restraint upon a supervisor because of matters unconnected with his performance of collective-bargaining functions does not restrain or coerce him in the performance of the latter functions and, that being the case, there is no restraint or coercion on the employer in the statutory sense.

Here the supervisors were not fined because they gave directions to the work force, interpreted the collective-bargaining agreement, adjusted grievances, or performed any other function generally related to supervisory activities, in a manner in disfavor with the Respondent Union. They were fined because they performed production work in the bargaining unit during a strike. Their Employer sought to use them, not in the direction of the work of employees who had not gone on strike or of replacements for strikers, but to replace the strikers themselves. In short, he assigned them to work as employees within the meaning of Section 2(3) of the Act, not as supervisors within the meaning of Section 2(11) of the Act. As the Supreme Court has held, fines of members who act as strikebreakers during a strike does not "restrain or coerce" them within the meaning of Section 8(b)(1) of the Act.[11] If the fine of an employee-member for engaging in strikebreaking does not restrain or coerce him within the meaning of Section 8(b)(1), I cannot see how the same restraint imposed upon a supervisor-member for the same activity can be broadened into restraint and coercion of the employer within the meaning of that section. All the restraint does, if successful, is to deny the employer the use of the supervisor as a production worker during the strike.[12]

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[11] *N.L.R.B.* v. *Allis Chalmers Manufacturing Co.*, 388 U.S. 175.

[12] If the Employer had requested his supervisors to perform their normal supervisory functions in the direction of replacements or other workers during the strike, we would have a different situation.

My colleagues argue, however, that,

> . . . During the strike of the Union, the Employer clearly considered its supervisors among those it could depend on during this period. The Union's fining of the supervisors who were acting in the Employer's interest in performing the struck work severely jeopardized the relationship between the Employer and its supervisors. Thus, the fines, if found to be lawful, would now permit the Union to drive a wedge between a supervisor and the Employer, thus interfering with the performance of the duties the Employer had a right to expect the supervisor to perform. The Employer could no longer count on the complete and undivided loyalty of those it had selected to act as its collective-bargaining agents or to act for it in adjusting grievances. Moreover, such fines clearly interfere with the Employer's control over its own representatives.[13]

The argument would be more appropriate if Section 8(b)(1) also made it an unfair labor practice for a union to induce or require supervisors to align themselves with the union on any matters.

However, the section does not contain such an unfair labor practice. Moreover, though the 1947 amendments did exclude supervisors from the definition of employee[14] and declared that "no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining,"[15] it also declared that "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member organization."[16] The effect of these various these

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[13] *Wisconsin Electric Power Co.*, 192 NLRB No. 16, incorporated by reference in the majority opinion herein.

[14] Labor Management Relations Act of 1947, 61 Stat. 136, 29 U.S.C. 152 (3).

[15] 29 U.S.C. 164 (a).

[16] *Ibid.*

various provisions is a denial of any statutory protection to supervisors either in their joining or assisting a union or in their refraining from such activities. It leaves the employer free to prohibit such activities or to permit them, to discharge supervisors for engaging in such activities if he desires. Congress gave employers this freedom to deal with supervisors precisely because of the problem of "divided loyalties."[11] It stopped short, however, of making it an unfair labor practice for a labor organization to organize supervisors or to admit them to membership. The only limitation it placed on unions in this regard is the narrow prohibition against restraining or coercing employers in the selection of representatives (including supervisors, but not limited to supervisors) for purposes of collective bargaining or the adjustment of grievances. My colleagues, in effect, construe this as a bill of rights freeing supervisors from any restraint or coercion by a labor organization, even where the effect is not to deny their employer the uncoerced performance of collective-bargaining or grievance-adjustment functions.

This construction goes far beyond that intended by Congress as disclosed by the relevant legislative history of the section: As first proposed in S. 1126, the section prohibited a labor organization from interfering with, as well as restraining or coercing, an employer in the selection of his bargaining representatives. Senate Report 105 on S. 1126, stated

> Section 8(b)(1): This proscribes unions and their agents from interfering with, restraining, or coercing employers in the selection of their representatives for the purposes of collective bargaining or the settlement of grievances. Thus, a union or its responsible agents could not, without violating the law, coerce an employer into joining or resigning from and an employer association, which negotiates labor contracts on behalf of its members; also, this subsection would not

[11] S. Rept. 105 on S. 1126, pp. 3-5, I Leg. Hist. 409-411 (1947).

permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances.[18]

This same refrain—the prohibition of forcing employers into or out of employer associations or of compelling them to remove or discharge supervisors or personnel directors who engage in the settlement of grievances—is repeated in the remarks of Senator Taft and other Senators during floor debate on the bill.[19] Although no Senator addressed himself to the precise question presented in this and the other cases cited by the majority, namely, the conditions under which coercion of the representative becomes or constitutes coercion of the employer in the selection of the representative, I believe the legislative history demonstrates that unless the union-imposed restraint on a supervisor is imposed because of his discharge of duties involved in the performance of the statutorily described functions or in the discharge of duties closely related thereto, the restraint or coercion is not proscribed by the section. At most, restraint imposed on the supervisor because of his performance of other functions constitutes an interference with the employer's selection of representatives for the performance of collective-bargaining or the adjustment of grievances functions assigned to such representatives, as indeed the majority opinion finally concludes with respect to the fines in this case. However, the words "interfere with" were eliminated from the section by an amendment offered by Senator Ives because of their far-reaching impact.[20] I cannot agree to the reinsertion of those words by decisional interpretation.

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[18] At p. 21, I Leg. Hist. 427 (1947).

[19] 93 Cong. Rec. 3953 (II Leg. Hist. 1012), 93 Cong. Rec. 4266 (II Leg. Hist. 1077), 93 Cong. Rec. 5106 (II Leg. Hist. 1454).

[20] 93 Cong. Rec. 4398 (II Leg. Hist. 1138-39).

In summary, because the fines involved herein were not imposed upon the supervisors because of the manner in which they performed duties related to their collective-bargaining or grievance-adjustment functions, but were imposed because of their violation of an unrelated union rule proscribing members of the union from performing struck work during a strike, I find that the supervisors were not restrained or coerced in the performance of the statutorily protected functions. It follows that the Employer was not restrained or coerced in the selection of representatives to perform such functions. Accordingly I would dismiss the complaint.

Dated, Washington, D.C. Jul 14 1971

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John H. Fanning, Member
National Labor Relations Board

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1559

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, AND LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 71-1785

BELL SUPERVISORS PROTECTIVE ASSOCIATION (NOT A LABOR ORGANIZATION), PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petitions for Review and Cross-Application for Enforcement of Order of the National Labor Relations Board

Decided September 22, 1972

Mr. Laurence J. Cohen and *Mr. Robert E. Fitzgerald, Jr.*, of the bar of the Supreme Court of Illinois, *pro hac*

vice, by special leave of court, for petitioners in No. 71-1559.

Mr. George B. Christensen for petitioner in No. 71-1785.

Mr. Daniel M. Katz, Attorney, National Labor Relations Board, with whom *Messrs. Marcel Mallet-Prevost*, Assistant General Counsel, and *Warren M. Davison*, Deputy Assistant General Counsel National Labor Relations Board, were on the brief, for respondent.

Before WRIGHT and MACKINNON, *Circuit Judges*, and MATTHEWS,* *U.S. Senior District Judge* for the District of Columbia.

Opinion filed by MACKINNON, *Circuit Judge*.

Opinion filed by WRIGHT, *Circuit Judge*, concurring in part and dissenting in part, at p. 36.

MACKINNON, *Circuit Judge*: Illinois Bell Telephone Company (hereinafter referred to as the Company or the Employer) and its predecessors have maintained a contractual relationship with Local 134, International Brotherhood of Electrical Workers, AFL-CIO (hereinafter referred to as Local 134) since 1909. Local 134 represents the Company's Chicago workers in the "Plant Department," including not only journeymen and apprentices employed as P.B.X.[1] installers but also persons employed as "P.B.X. Installation Foremen," "Building Cable Foremen," and "General Foremen."[2] Under Article III, Section 1 of the collective bargaining agreement between Local 134 and the Company, which was in effect at all

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* Sitting by designation pursuant to 28 U.S.C. § 294(c) (1970).

[1] "P.B.X." is the abbreviation for "private branch exchange," the telephone apparatus installed and maintained by the Company on the private premises of a customer.

[2] This arrangement whereby foremen and rank-and-file employees have been included in the same bargaining unit was voluntarily consented to by the Employer.

times relevant to the instant case, all members of the bargaining unit, including the above-mentioned foremen, were required to become and remain members of Local 134 within thirty days of the commencement of their employment.[3]

Between May 8, 1968, and September 20, 1968, Local 134 engaged in an economic strike against the Company. At the inception of this strike, the Company informed the foremen that it would like to have them come to work during the work stoppage, but it told them that the decision whether to work or to respect the strike was a matter left to the personal discretion of each individual foreman. The Employer indicated that those who chose not to work would not be penalized. On the other hand, a Local 134 representative warned the foremen, at a union meeting held immediately before the strike, that they would be subject to union discripline if they performed rank-and-file work[4] during the strike. In response to this warning, several foremen formed the Bell Supervisors Protective Association (hereinafter referred to as the Association), and through it they retained counsel to protect the rights of those foremen who chose to work during the strike. The Association also planned to encourage other Company foremen to report to work during the work stoppage.

During the course of the strike, some of the foremen reported to work and performed rank-and-file work, while

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[3] Although collective bargaining agreements between the parties had at one time prescribed the monthly wage rates applicable to foremen, recent contracts have not contained such wage provisions. However, the agreement relevant here included a section entitled "Working Conditions for General Foremen and Foremen," which concerned payment for overtime work and for certain absences. Furthermore, when the Company recently revised the overtime schedule pertaining to foremen, it requested the concurrence of Local 134.

[4] "Rank-and-file work" concerns that work which is ordinarily performed by regular, non-supervisory employees in the bargaining unit.

other foremen chose to honor the strike and stayed away from work. After the strike, the Company in no way discriminated against the latter group, and it indeed promoted some of them to higher positions. Local 134, however, carried out its pre-strike warning and conducted disciplinary proceedings against a number of foremen.* Local 134 imposed fines of $500 on each foreman who performed rank-and-file work during the strike, and it imposed fines of $1,000 each on the five foremen who were instrumental in the formation of the Association. Most of the foremen who were fined exercised their right under the constitution of the International Brotherhood of Electrical Workers, AFL-CIO (hereinafter referred to as the International Union) to appeal from the disciplinary action of Local 134—first to the International Union Vice President, and then to the International Union President. The appellants contended that Local 134's imposition of fines upon them was illegal, and they asserted that the contractual union-security provision which required them to be members of Local 134 was similarly unlawful. Of those foremen who appealed, three had their appeals sustained on the ground that the charges against them had not been timely filed. Three others had their appeals disqualified based upon the procedural ground that their appeals were untimely. The other appellants had their disciplinary fines upheld. Local 134 has commenced suit in the Illinois courts to collect some of the fines. Insofar as any of the foremen have paid any part of the fines, the Company has reimbursed them.

In June of 1969, the Association filed an unfair labor practice charge with the National Labor Relations Board (Labor Board or N.L.R.B.), alleging that Local 134 and the International Union had violated section 8(b)(1)(B) of the National Labor Relations Act, as amended

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*Pursuant to the union-shop provision in the applicable collective bargaining agreement, these foremen were all full members of Local 134.

(N.L.R.A.),[4] by fining the Company foremen because of their performance of rank-and-file work during the 1968 strike and by fining the five foremen who were instrumental in the formation of the Association. A complaint was issued pursuant to this charge, and a hearing relating thereto was held before Trial Examiner Frederick Reel. The first three days of hearings were devoted exclusively to the section 8(b)(1)(B) issue. However, on the afternoon of the fourth and final day of hearings, as the hearings were about to be closed, counsel for the Association offered a motion to amend the complaint "to Conform Pleading [*i.e.*, the complaint] to Proof." The Association indicated that the collective bargaining agreement which contained the union-security provision had been admitted into evidence as part of the section 8(b)(1)(B) case, and it argued that this provision was in clear violation of section 8(a)(3) (i) of the N.L.R.A., since it covered a bargaining unit which included both "employees" and "supervisors."[5]

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[4] 29 U.S.C. § 158(b)(1)(B) (1970) provides; "It shall be an unfair labor pratice for a labor organization or its agents—(1) to restrain or coerce * * * (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."

[5] 29 U.S.C. § 158(a)(3) 1970) provides in relevant part:

> (a) It shall be an unfair labor practice for an employer—
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> (2) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective bargaining unit covered by such agreement when made; * * *

Since the bargaining unit included supervisors [*see* note 12 and accompanying text and note 24, *infra.*] with regular rank-and-file employees, the Association contended that the unit covered by the Company-Local 134 union-shop provision was not "appropriate" within the meaning of section 8(a)(3)(i). However, due to fact that Local 134 was the only one of the two contracting parties before the Trial Examiner, the Association did not allege a violation of section 8(a)(3)(i), which only applies to employers, but it instead asserted the presence of a section 8(b)(2) violation. 29 U.S.C. § 158(b)(2) (1970) provides, *inter alia*: "It shall be an unfair labor practice for a labor organization or its agents—* * * (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section [*i.e.*, section 8(a)(3)] * * *"

The counsel for the General Counsel of the Labor Board did not join in or consent to the Association's motion to amend the complaint.[8] The Trial Examiner noted that the identical legal contention presented by the Association had previously been rejected by the General Coun-

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[8] It is important to note that the precise issue concerning the legality of the union-security provision under section 8(a)(3)(i) of the N.L.R.A. had been previously raised by the Association, in 1968, at which time the General Counsel of the Labor Board refused to issue a complaint relating to th Association's unfair labor practice charge. Case 13-CA-8451. At that time, the General Counsel concluded:

> The inclusion of alleged supervisors in the unit by voluntary agreement of the contracting parties did not, standing alone, constitute an unfair labor practice, nor did it render such unit inappropriate for coverage by an otherwise valid union security clause. See *Nassau & Suffolk Contractors Ass'n.*, 118 NLRB 174, 177-184; * * *

sel,[9] and he decided that it would not be appropriate to permit such an amendment under the circumstances of the case before him. He noted that "the amendment offered by the [Association] would of necessity add factual allegations to the complaint as well as new [N.L.R.A.] subsections to the list of those violated."[10] The Trial Examiner pointed out that the Association was seeking the invalidation of a contractual provision which had been in existence for many years, and he emphasized the fact that cases which had been recently before the Labor Board itself had involved such union-shop arrangements without evoking any intimation that the Board found anything irregular in them. In finally concluding that it would be "inadvisable" to permit the Association's amendment, the Trial Examiner said that he doubted "the wisdom of deciding so far reaching a question which enters this litigation only by the back door, as it were."[11] The N.L.R.B. sustained this determination.

The Labor Board concluded, in agreement with the Trial Examiner, that the Company foremen in question were "supervisors" within the meaning of section 2(11) of the Act,[12] at all times relevant to the case. It also affirmed the determination that such foremen were "Employer representatives" within the meaning of section 8(b)(1)(B) of the Act.[13] The Labor Board finally concurred in the Trial Examiner's conclusion that both unions—Local

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[9] *See* note 8, *supra*.

[10] *International Brotherhood of Electrical Workers, AFL-CIO, and Local 134, I.B.E.W.*, 192 NLRB No. 17, T.X.D. slip op. at 13, 1971 CCH NLRB ¶ 23,282 (1971).

[11] *Id.*

[12] 29 U.S.C. § 152(11) (1970). *See N.L.R.B.* v. *Henry Colder Co.*, 416 F.2d 750, 754 n.3 (7th Cir. 1969), and cases cited therein.

[13] *See* note 6, *supra*. Local 134 and the International Union have not challenged, on appeal, the Labor Board's findings that the foremen were "supervisors" and "Employer representatives," within the meaning of the N.L.R.A.

134 and the International Union[14]—had restrained and coerced the Company in the selection of its collective bargaining and grievance adjustment representatives, in violation of section 8(b)(1)(B), by disciplining foremen/members for performing rank-and-file work during the 1968 strike and by fining foremen/members because of their action in forming the Association. A cease and desist order was issued, and the two unions were affirmatively ordered to rescind, and expunge all records of the fines imposed upon the foremen in violation of section 8(b)(1)(B) of the N.L.R.A.; to reimburse the foremen for any portions of their fines already paid; to advise each such foreman in writing that the fines have been rescinded and that the records pertaining thereto have been expunged; and to post appropriate notices.

The two unions and the Association petitioned this court for review of the Labor Board's decision, and the N.L.R.B. filed a cross-application for enforcement of its order. We affirm the decision of the Labor Board insofar as it pertains to the section 8(b)(1)(B) determination and the denial of the Association's request to amend the complaint. However, while enforcement of the Board's remedial order against Local 134 is granted in full, we believe that the remedial order against the International Union must be modified to reflect its proper measure of unfair labor practice responsibility.

I

Section 8(b)(1)(B) of the N.L.R.A. prohibits union coercion or restraint of an employer in the selection of his representatives for the purposes of collective bargaining

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[14] The Labor Board found the International Union in violation of section 8(b)(1)(B), due to its affirmance, on appeal, of Local 134's imposition of disciplinary fines against the foremen. However, the Board's remedial order only provided for secondary liability on the part of the International Union with respect to the reimbursement of already collected fines and the providing of individual written notices for the disciplined foremen.

or the adjustment of grievances."[15] This provision, of course, clearly proscribes *direct* union interference with an employer's selection of this section 8(b)(1)(B) representatives.[16] However, as the Labor Board and several courts, including this one, have recently recognized, it also has much broader application. It prohibits *indirect* union restraint or coercion of an employer, accomplished through the imposition of discipline upon the employer's representatives for actions performed by them within the general scope of their supervisory or managerial responsibilities. Although the unions involved in the instant case have challenged this latter interpretation of section 8(b)(1)(B) as being an unwarranted extension of the express language of the statutory provision, we must reject this assertion as contrary to the legislative intent of Congress.

A. *OAKLAND MAILERS AND ITS PROGENY*

In *San Francisco-Oakland Mailers' Union No.18, International Typographical Union*, 172 NLRB No. 252, 1968-2 CCH NLRB ¶ 20,195 (1968), the N.L.R.B. held illegal union actions which "were designed to change the [employer's] representatives from persons representing the viewpoint of management to persons responsive or subservient to [the union's] will."[17] In reaching the conclusion that the union's imposition of discipline on supervisors because of the manner in which they interpreted and applied the collective bargaining agreement violated section 8(b)(1)(B), the labor Board noted:

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[15] *See* note 6, *supra*.

[16] *See Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America* v. *N.L.R.B.*, —— U.S.App. D.C. ——, ——, 458 F.2d 794, 798 (1972); *N.L.R.B.* v. *Local 294, International Brotherhood of Teamsters*, 284 F.2d 893 (2nd Cir. 1960); *Los Angeles Cloak Joint Board*, 127 NLRB 1543, 1550-1551 (1960); *International Union of Operating Engineers, Local 825*, 145 NLRB 952, 962 (1964).

[17] 172 NLRB No. 252, slip op. at 2, 1968-2 CCH NLRB ¶ 20,195.

> In enacting Section 8(b)(1)(B) Congress sought to prevent the very evil involved herein—union interference with an employer's control over its own representatives. *That [the union] may have sought the substitution of attitudes rather than persons, and may have exerted its pressure upon the [employer] by indirect rather than direct means, cannot alter the ultimate fact that pressure was exerted here for the purpose of interfering with the [employer's] control over its representatives. Realistically, the Employer would have to replace its foremen or face de facto nonrepresentation by them.*[10]

More recent Labor Board and court decisions have further applied the doctrine enunciated in *Oakland Mailers.* In *N.L.R.B.* v. *Toledo Locals Nos. 15-P and 272 of the Lithographers and Photo-Engravers International Union,* 437 F.2d 55 (6th Cir. 1971), wherein the court upheld the Labor Board's finding of a section 8(b)(1)(B) violation, the Sixth Circuit stated:

> This conduct of the union could very well be considered as an endeavor to apply pressure on the supervisory employees of the [employer], and to interfere with the performance of the duties which the employer required them to perform * * * and to influence them to take action which it, the employer, might deem detrimental to its best interests. This conduct of the union *would further operate to make the [supervisory] employees reluctant in the future to take a position adverse to the union, and their usefulness to their employer would thereby be impaired.*

437 F.2d at 57 (emphasis supplied). *See New Mexico District Council of Carpenters and Joiners of America,* 177

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[10] 172 NLRB No. 252, slip op. at 2-3, 1968-2 CCH NLRB ¶ 20,195 (emphasis supplied). *See New Mexico District Council of Carpenters and Joiners of America,* 176 NLRB No. 105, slip op. at 4-5, 1969 CCH NLRB ¶ 20,951 (1969), *enfd.,* —— F.2d ——, 67 L.C. ¶ 12,403 (10th Cir. 1972).

NLRB 500, 502 (1969), *enfd.*, —— F.2d ——, 67 L.C. ¶ 12,403 (10th Cir. 1972); *N.L.R.B.* v. *Sheet Metal Workers, Local 49*, 430 F.2d 1348, 1349-1350 (10th Cir. 1970); *Local Union No 2150, International Brotherhood of Electrical Workers*, 192 NLRB No. 16, slip op. at 5-6 and cases cited n.5, 1971 CCH NLRB ¶ 23,280 (1971).

This court has also recognized the fact that the imposition of fines upon supervisory employees may coerce or restrain their employer in the effective selection of his representatives within the meaning of section 8(b)(1)(B). *See Dallas Mailers Union, Local 143* v. *N.L.R.B.*, 144 U.S. App.D.C. 254, 259, 445 F.2d 730, 735 (1971). Although we did not expressly evaluate the propriety of the legal rationale underlying the *Oakland Mailers'* line of cases in our *Dallas Mailers* opinion, we implicity recognized its correctness. However, in our subsequent *Meat Cutters* opinion, [19] we gave our express approval to the decisions which had interpreted section 8(b)(1)(B) as prohibiting union discipline of supervisory personnel for acts performed by them in the course of their supervisory or managerial duties.[20] Our conclusion was based upon the intention of Congress as expressed in the legislative history surrounding the enactment of section 8(b)(1)(B) in 1947.

The Supreme Court has recognized the fact "that labor legislation is peculiarly the product of legislative compromise of strongly held views, *Local 1976, Carpenters' Union* v. *Labor Board*, 357 U.S. 93, 99-100, and that legislative history may not be disregarded merely because it is arguable that a provision may unambiguously embrace [or not embrace] conduct called in question. *National Woodwork Mfrs. Assn.* v. *NLRB*, 386 U.S. 612, 619-620."[21]

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[19] *Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America* v. *N.L.R.B.*, —— U.S.App.D.C. ——, 458 F.2d 794 (1972).

[20] *Id.*, —— U.S.App.D.C. at ——, 458 F.2d at 798-799.

[21] *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.* 388 U.S. 175, 179 (1967).

When Congress was considering amendments to the National Labor Relations Act in 1947, it was acutely aware of the fact that unions had previously "taken it upon themselves to say that management should not appoint any representative who [was] too strict with the membership of the union," and through the enactment of section 8(b)(1)(B) it endeavored "to prescribe a remedy in order to prevent such interferences."[22] Although this fact is highly pertinent to our evaluation of the proper scope of Section 8(b)(1)(B), other legislative history surrounding the 1947 amendments must also be considered.

Section 8(b)(1)(B) must not be examined in a vacuum. It must instead be interpreted in conjunction with the other 1947 amendments to the N.L.R.A. relating to supervisory personnel.[23] The fact that Congress decided to expressly exclude "supervisors" from the statutory definition of "employee" in section 2(3)[24] is highly informative.

> Congress was aware of the potential conflict between the obligations of foremen as representatives of their employers, on the one hand, and as union members, on the other. Section 2(3) evidences its *intent to make the obligations to the employer paramount.*
>
> That provision excepts foremen from the protection of the Act. Its purpose was to give the employer a

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[22] II *Legislative History of the Labor Management Relations Act, 1947* (N.L.R.B. 1948) [hereafter *"Legislative History"*] at 1077 (comments of Senator Ellender). *See* S. Rep. No. 105, 80th Cong., 1st Sess. 21 (1947), in I *Legislative History* at 427; II *Legislative History* at 1524 (comments of Senator Ball).

[23] *See* sections 2(3), 2(11), and 14(a), 29 U.S.C. §§ 152(3), 152(11), and 164(a) (1970).

[24] 29 U.S.C. § 152(3) (1970) provides, *inter alia*: "The term 'employee' shall include any employee • • • but shall not include • • • any individual employed as a supervisor • • •" *See* section 2(11) of the Act, 29 U.S.C. § 152(11) (1970), for the statutory definition of "supervisor."

free hand to discharge foremen as a means of *ensuring their undivided loyalty, in spite of any union obligations.* See H. Rep. No. 245, 80th Cong., 1st Sess. 14-17 (1947); S. Rep. No. 105, 80th Cong., 1st Sess. 3-5 (1947); L.A. Young Spring & Wire Corp. v. National Labor Relations Board, 1947, 82 U.S.App.D.C. 327, 163 F.2d 905, certiorari denied 1948, 33 U|S. U.S. 837

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from the absolute duty, evidenced by section 8(b)(1)(B),

In *Meat Cutters,* we considered this prior analysis of the 1947 legislative history and concluded that "[a] supervisor's obligations to his union simply cannot detract which he owes to his employer when exercising his managerial authority."[23]

To ensure the accomplishment of the clear intention of Congress when it enacted section 8(b)(1)(B), that provision must not be interpreted in a hyper-technical manner. To construe that section as only applying to union discipline of a supervisor based upon his actions on behalf of management regarding a specific disagreement with the union over the proper interpretation of the collective bargaining agreement or the adjustment of a particular grievance, would defeat the reasons underlying Congress' enactment of section 8(b)(1)(B). When a supervisor is disciplined by a union because of the manner in which he exercised his supervisory or managerial authority—wheth-

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[22] *Carpenters District Council of Milwaukee* v. *N.L.R.B.*, 107 U.S.App.D.C. 55, 57, 274 F.2d 564, 566 (1959) (emphasis supplied). *See* II *Legislative History* at 1524 (comments of Senator Ball).

[23] *Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America* v. *N.L.R.B.*, —— U.S.App.D.C. ——, ——, 458 F.2d 794, 800 (1972). *See Texas Co.* v. *N.L.R.B.*, 198 F.2d 540, 542 (9th Cir. 1952), wherein the court stated that "it is clear from the history of the Taft-Hartley legislation that Congress intended to restore to employers the right and power to insist upon the undivided loyalty of their supervisory personnel."

er or not he was applying a contract provision or adjusting a grievance—that disciplinary action necessarily impinges upon the supervisor's loyalty to his employer, thereby effectively depriving the employer of the undivided loyalty which he has the right to expect under section 8(b)(1)(B). The fact that in such a situation the union "may [seek] the substitution of attitudes rather than persons, and may [exert] its pressure upon the [employer] by indirect rather than direct means, cannot alter the ultimate fact that pressure [is] exerted * * * for the purpose of interfering with the [employer's] control over its representatives * * * [and it realistically will] have to replace its foremen or face *de facto* nonrepresentation by them."[27] It is therefore intuitively obvious that if the principles underlying the Congressional enactment of section 8(b)(1)(B) are to be given full effect, such conduct by a union cannot be permitted, as the National Labor Relations Board has properly recognized.[28]

The fact that section 14(a) of the N.L.R.A.[29] permits

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[27] *San Francisco-Oakland Mailers' Union No. 18, International Typographical Union*, 172 NLRB No. 252, slip op. at 3, 1968-2 CCH NLRB ¶ 20,195 (1968).

[28] This interpretation of section 8(b)(1)(B) does *not* mean that a union may *never* discipline a supervisor/member for breaching a valid upon rule. *See, e.g., Local 453, Brotherhood of Painters, Decorators and Paperhangers of America*, 183 NLRB No. 24, 1970 CCH NLRB ¶ 21,981 (1970.) It only proscribes union interference for acts performed by a supervisor relating to his supervisory or managerial duties. *See Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America* v. *N.L.R.B.*, —— U.S.App.D.C. ——, 458 F.2d 794 (1972).

[29] 29 U.S.C. § 164(a) (1970) provides:

> (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collectives bargaining.

supervisors to be union members does not detract from the undivided loyalty they owe to their employer under section 8(b)(1)(B) when they are engaged in supervisory or managerial endeavors. *See Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America* v. *N.L.R.B.* —— U.S.App.D.C. ——, ——, 458 F.2d 794, 799-800 (1972). Similarly, the fact that an employer may have consented to the compulsory union membership of his supervisors under an appropriate union-security provision does not negate his right to the full protection of section 8(b)(1)(B). *See Toledo Locals Nos. 15-P and 272 of the Lithographers and Photo-Engravers International Union*, 175 NLRB 1072, 1080 (1969), *enfd.*, 437 F.2d 55 (6th Cir. 1971); *Local Union No. 2150, International Brotherhood of Electrical Workers*, 192 NLRB No. 16, slip op. at 5, 1971 CCH NLRB ¶ 23,280 (1971).

B. EFFECT OF *ALLIS-CHALMERS* AND SCOFIELD

In our previous *Meat Cutters* decision, we briefly explained why the rationale underlying the Supreme Court's decisions in *Allis-Chalmers*[10] and *Scofield*[11] does not relieve a union from responsibility under section 8(b)(1)(B) where it imposes disciplinary fines upon supervisor/members because of supervisory or managerial acts performed by them.[12] However, due to the close factual similarity between the instant case and the *Allis-Chalmers* situation, we believe that an expanded analysis here would be beneficial.

In *Allis-Chalmers* and *Scofield*, the Supreme Court sanctioned the imposition of fines by unions on *employees*—

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[10] *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967).

[11] *Scofield* v. *N.L.R.B.*, 394 U.S. 423 (1969).

[12] *See Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America* v. *N.L.R.B.*, —— U.S.App.D.C. ——, ——, 458 F.2d 794, 800-801 (1972).

not supervisors—who had violated valid union rules. However, those cases, unlike the present one, concerned the scope of section 8(b)(1)(A) of the Act,[9] not section 8(b)(1)(B), with which we are herein concerned. In upholding the union fines in *Allis-Chalmers* and *Scofield*, while the Supreme Court did not rely upon the *express* language of the *proviso* to section 8(b)(1)(A), as the Labor Board had originally done in *Minneapolis Star and Tribune Co.*, 109 NLRB 727 (1954), it did draw "cogent support" for its decision from it.[10] *See N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 191-192 (1967); *Scofield* v. *N.L.R.B.*, 394 U.S. 423, 428 (1969). *See also* Gould, *Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis-Chalmers*, 1970 DUKE L.J. 1067, 1128 (1970). The applicability of that *proviso* is, however, clearly limited to section 8(b)(1)(A), which regulates the union-employee relationship. It is *not* a part of section 8(b)(1)(B), which directly regulates

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[9] 29 U.S.C. § 158(b)(1)(A) (1970) provides:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
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> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

See 29 U.S.C. § 157 (1970).

[10] *Compare Booster Lodge No. 405, International Association of Machinists and Aerospace Workers* v. *N.L.R.B.*, —— U.S.App.D.C. ——, ——, 459 F.2d 1143, 1149, *with Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North Amercica* v. *N.L.R.B.*, —— U.S.App.D.C. ——, ——, 458 F.2d 794, 800 (1972).

only the union-employer relationship.[33] Although reliance upon the *proviso* may not have been critical to the Supreme Court's decisions in *Allis-Chalmers* and *Scofield*, the fact that it does not have any application in section 8(b)(1)(B) cases indicates that the rationale underlying those two Supreme Court decisions is not apposite with respect to cases, such as the instant one, which involve the disciplining, by unions, of "supervisors" instead of "employees." Furthermore, a closer evaluation of the *Allis-Chalmers* and *Scofield* decisions clearly demonstrates that the reasoning of those opinions is not applicable with respect to section 8(b)(1)(B) cases.

Under the reasoning of *Allis-Chalmers* and *Scofield*, only legitimate *internal union affairs* are protected. *See N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 185-187, 195 (1967); *Scofield* v. *N.L.R.B.*, 394 U.S. 423, 428 (1969).[34] Those cases primarily concerned the relationship between the unions and their employee/members, and the Court concluded that the union discipline had no improper effect on parties external to that relationship. However, when a union imposes discipline upon a *supervisor*/member for acts performed by him in furtherance of this supervisory or managerial duties, *external* relationships which are *not* protected by the rational underlying *Allis-*

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[33] *See San Francisco-Oakland Mailers Union No. 18, International Typographical Union*, 172 NLRB No. 252, slip op. at 4, 1968-2 CCH NLRB ¶ 20,195 (1968); *Price* v. *N.L.R.B.*, 373 F.2d 443, 446 (9th Cir. 1967), *cert. denied*, 392 U.S. 904 (1968); *Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America* v. *N.L.R.B.*, —— U.S.App.D.C. ——, ——, 458 F.2d 794, 800-801 (1972). *See also* II *Legislative History* at 1139, 1141, and 1200.

[34] *See also N.L.R.B.* v. *Sheet Metal Workers, Local 49*, 430 F.2d 1348, 1350 (10th Cir. 1970); *N.L.R.B.* v. *Toledo Locals Nos. 15-P and 272 of the Lithographers and Photo-Engravers International Union*, 437 F.2d 55, 57 (6th Cir. 1971).

Chalmers and *Scofield* are affected."[17] The supervisor-employer relationship is impermissibly affected in an adverse manner, through the union's subversion of the undivided loyalty owed by the supervisor to his employer when he is properly acting to further the interests of his employer. The union also improperly affects the union-employer relationship in a meaningful way. Instead of directly dealing with the employer over the managerial "position" which is displeasing to it, the union attempts to force the acceptance of its view upon the employer indirectly, through the imposition of union discipline upon the employer's chosen representative. Such *external* ramifications of the union's actions clearly transcend anything protected by the Supreme Court in either *Allis-Chalmers* or *Scofield*."

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[17] *See Silard, Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers and Scofield*, 38 GEO. WASH. L.REV. 187, 196 (1969):

> [I]n safeguarding the regulation of union membership from Labor Board review Congress did not authorize unions to violate with impunity the protected rights of other parties—particularly of employers, neutrals, and the public.

[18] It is vitally important to remember that sections 8(b)(1)(A) and 8(b)(1)(B) protect different interests. Section 8(b)(1)(A) was only intended to impose some slight controls upon the union-*employee* relationship, and the legislative history makes it clear that Congress did not intend extensive regulation of the *internal* union-*employee*/member relationship. *See N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 183-195 (1967). *See also National Maritime Union*, 78 NLRB 971, 982-987 (1948), *enfd.*, 175 F.2d 686 (2nd Cir. 1949), *cert. denied*, 338 U.S. 954 (1950). Section 8(b)(1)(B), on the other hand, was clearly intended to regulate the *external* union-*employer* relationship. It is therefore apparent that considerations concerning the right of a labor organization to regulate its *internal* union affairs are not really relevant when the union action in question has meaningful *external* effects upon an employer, in an area wherein the employer is expressly protected under the Act.

Supreme Court decisions issued subsequent to *Allis-Chalmers* have made it expressly clear that the *Allis-Chalmers* rationale only permits "a union • • • to enforce a properly adopted rule which reflects a legitimate union interest [and] *impairs no policy Congress has imbedded in the labor laws* • • •" *Scofield* v. *N.L.R.B.*, 394 U.S. 423, 430 (1969) (emphasis supplied), *and see* 394 U.S. at 429, 432. *See N.L.R.B.* v. *Marine Workers*, 391 U.S. 418 (1968); *Booster Lodge No. 405, International Association of Machinists and Aerospace Workers* v. *N.L.R.B.*, —— U.S.App.D.C. ——, ——, 459 F.2d 1143, 1150." Section 8(b)(1)(B) of the Act expresses a clear Congressional policy aimed at affording employers protection against union interference with their chosen representatives. Whenever union action has the effect of impermissibly inhibiting an employer with respect to his choice of loyal representatives, it is apparent that an express federal labor policy is being violated, and it necessarily follows that the rationale underlying *Allis-Chalmers* and *Scofield* cannot be availed upon to nullify the clear section 8(b)(1)(B) violation."

" *See also District 50, Local 12419*, 176 NLRB No. 25, 71 LRRM 1311 (1969); *N.L.R.B.* v. *International Molders and Allied Workers Union, Local 125*, 442 F.2d 92, 94 (7th Cir. 1971).

" Although there may be some persons unfamiliar with the Congressional attitudes which prevailed in 1947 who might believe that it is not appropriate to treat the fining of *supervisor*/members for working during a strike differently from the disciplining of *employee*/members for the same acts, the superficial surface similarity between the two events underlying the union discipline cannot obfuscate the extremely important difference between "supervisors" and "employees" which is recognized by their different treatment under the N.L.R.A. Had the 1947 Congress intended for such persons to be treated alike, it surely would *not* have enacted section 8(b)(1)(B) and the exclusionary portion of section 2(3) relating to supervisory personnel.

II

Having discussed the general principles which apply to section 8(b)(1)(B) cases such as the instant one, and the applicability of the *Allis-Chalmers* and *Scofield* reasoning to section 8(b)(1)(B) situations, we turn to an evaluation of the Labor Board's analysis of the particular facts of this case. We first consider the union fines which were imposed upon the supervisor/members who performed rank-and-file work during the economic strike, and secondly consider the disciplinary action which was taken against those supervisor/members who were instrumental in the formation of the Association.

Although the Employer did not *require* his supervisors to report to work during the 1968 strike, the Company made it very clear that it wanted them to perform rank-and-file work in place of the striking employees. However, despite the fact that the Company took action to allow its supervisory personnel to exercise their own personal discretion in this matter, Local 134 sought to prevent this by threatening the imposition of discipline on any supervisor/member who decided to further the interests of his Employer by acceding to the request of the Company and performing rank-and-file work during the work stoppage. When Local 134's threats were not sufficient to deter some of the supervisors from honoring the request of their Employer, the union imposed fines of $500 on each.

The Labor Board correctly recognized that Local 134's disciplinary actions taken by Local 134 were a direct result of the fact that those supervisors who reported to work during the strike placed the interests of their Employer above those of their union. It further emphasized the fact that actions of Local 134 "were designed to change the [Company's] representatives from persons representing the viewpoint of management to persons responsive or subservient to [Local 134's] will."[41] The Board concluded

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[41] *International Brotherhood of Electrical Workers and Local 134, I.B.E.W.*, 192 NLRB No. 17, T.X.D. slip op. at 7, as adopted by N.L.R.B., slip op. at 2, 1971 CCH NLRB ¶ 23,282 (1971).

that under the reasoning of *Oakland Mailers* and its progeny, such conduct contravened the principles enunciated in section 8(b)(1)(B) of the Act. We agree.

The underlying dispute giving rise to the imposition of the penalties in question was directly between the union and the Company—*not* between the union and the supervisor/members. Local 134 called the strike to encourage a collective bargaining settlement favorable to it. Although the union had the right to insist upon the loyalty of those *employee*/members who were in the bargaining unit covered by the strike,[11] the Company also had the legitimate right under the N.L.R.A. to call upon the undivided loyalty of its representatives.[12] This latter statutory right of the Employer was particularly apropos in the instant case, due to the strike situation.

It is well recognized that "the use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; *it is part and parcel of the process of collective bargaining.*" *N.L.R.B.* v. *Insurance Agents International Union*, 361 U.S. 477, 495 (1960) (emphasis supplied). It is readily apparent, therefore, that when supervisors' actions during an economic strike further the interests of their employer, they are performing in a manner which could reasonably be expected from such persons. *See Local Union No. 2150, International Brotherhood of Electrical Workers*, 192 NLRB No. 16; 1971 CCH NLRB ¶ 23,280 (1971). *See also Texas Co.* v. *N.L.R.B.*, 198 F.2d 540 (9th Cir. 1952). As management representatives, supervisory personnel may be requested by management to enhance the bargaining position of their employer during a dispute between it and the particular

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[11] *See N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180-181 (1967). *See also Booster Lodge No. 405, International Association of Machinists and Aerospace Workers* v. *N.L.R.B.*, —— U.S.App.D.C. ——, —— 459 F.2d 1143, 1149-50 (1972).

[12] *See* Part I(A) of this opinion, *supra*.

union involved. Yet this is the precise activity for which the supervisors in question were disciplined by Local 134.[44] Under these circumstances, since they were clearly punished for actions undertaken by them as representatives of their Employer within the meaning of section 8(b)(1)(B),[45] and in accordance with the Employer's express wishes, it logically follows that the disciplining union thereby violated section 8(b)(1)(B) of the Act.

> The Union's fining of the supervisors, who were acting in the Employer's interest in performing the struck work severely jeopardized the relationship between the Employer and its supervisors. Thus, the fines, if found to be lawful, would now permit the Union to drive a wedge between a supervisor and the Employer, thus interfering with the performance of the duties the Employer had a right to expect the supervisor to perform. The Employer could no longer count on the complete and undivided loyalty of those it had selected to act as its collective bargaining agents or to act for it in adjusting grievances.[46]

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[44] There is no question that supervisors enhance the bargaining position of their employer when they perform rank-and-file work during a strike, since their actions reduce the severity of the economic pressure borne by their employer as a result of the work stoppage.

[45] The unions have not challenged the finding of the Labor Board regarding the representative status of the supervisors.

[46] *Local Union No. 2150, International Brotherhood of Electrical Workers*, 192 NLRB No. 16, slip op. at 6-7, 1971 CCH NLRB ¶ 23,280 (1971). *See New Mexico District Council of Carpenters and Joiners of America*, 177 NLRB 500, 502 (1969), *enfd.*, —— F.2d ——, 67 L.C. ¶ 12,403 (10th Cir. 1072); *Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America* v. *N.L.R.B.*, —— U.S.App.D.C. ——, ——, 458 F.2d 794, 798-799 (1972); *N.L.R.B.* v. *Sheet Metal Workers, Local 49*, 430 F.2d 1348, 1349 (10th Cir. 1970). *See also* Part I(A) of this opinion, *supra*, and cases cited therein.

The two unions argue that the Labor Board erroneously concluded that the Employer was "restrained or coerced," within the meaning of section 8(b)(1)(B), by Local 134's imposition of disciplinary fines, on the theory that the Company did not require its supervisors to perform rank-and-file work during the strike. However, this contention overlooks the fact that the Employer clearly expressed his desire by requesting (without ordering) the supervisors to perform such work in furtherance of the Company's bargaining interests. It also ignores the possible detrimental effects which such disciplinary action might have upon the future relationship between the Employer and its supervisors. It is also contrary to the well settled judicial decisions interpreting the meaning of "restraint or coercion."

"[I]n determining whether a § 8(a)(1) or §8(b)(1) violation has been committed, the answer does not 'turn on • • • whether the coercion succeeded or failed • • • the test is whether the employer [or union] engaged in conduct which, it may be reasonably said, tend[ed] to interfere with the free exercise of [the rights protected] under the Act.' N.L.R.B. v. Illinois Tool Works, 153 F.2d 811, 814 • • •" *Local Union No. 167, Progressive Mine Workers of America* v. *N.L.R.B.*, 422 F.2d 538, 542 (7th Cir.), *cert. denied*, 399 U.S. 905 (1970). *See Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America* v. *N.L.R.B.*, —— U.S.App. D.C. ——, ——, 458 F.2d 794, 801 n.20. The fact that the Labor Board did not examine the subjective effect upon the Employer of the union discipline with respect to each supervisor does not detract from its conclusion that the disciplinary action was illegal, since the Board reasonably determined that such action meaningfully detracted from the undivided loyalty owed by the supervisors to their Employer. *See N.L.R.B.* v. *Gissel Packing Co.*, 395 U.S. 575, 608 (1969); *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 51 (1954); *N.L.R.B.* v. *Donnelly Garment Co.*, 330 U.S. 219, 231 (1947). We find substantial evidence in the record

considered as a whole to support this Labor conclusion."

B. SUPERVISORS WHO FORMED THE ASSOCIATION

We believe that the Labor Board properly determined that the fining of those supervisors who participated in the formation of the Association constituted a separate section 8(b)(1)(B) violation. The Board resolved this issue in the following manner:

> [T]he Bell Supervisors Protective Association arose out of relations among the supervisors, *the Company*, and the Union, and not * * * out of relations solely between the supervisors and the Union. The Association was formed because the Union threated to fine supervisors for working during the strike, and to protect or aid those who desired to work. As the Association had its inception as a response to what is here found to be illegal union conduct, it is not unreasonable to extend the finding of illegality to cover the Union's fines relating to the Association. Although the Company was not a party to the creation of the Association, the relationship of the supervisors to the Company underl[ay] the creation of the Association just as it underl[ay] the action of the supervisors in working during the strike. To separate the two sets of fines would be highly legalistic and unrealistic, a practice on which the Board has properly frowned on past occasions, prefering [sic] to treat situations "as a whole."[48]

"[W]here the question is one of specific application of a broad statutory term in a proceeding in which the

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[47] *See* 29 U.S.C. §§ 160(e) and 160(f) (1970). *See also Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951).

[48] *International Brotherhood of Electrical Workers and Local 134, I.B.E.W.*, 192 NLRB No. 17, T.X.D. slip op. at 10, as adopted by N.L.R.B., slip op. at 2, 1971 CCH NLRB ¶ 23,282 (1971) (emphasis in original).

agency administering the statute must determine it initially, the reviewing court's function is limited. • • • [T]he Board's determination • • • is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944). We believe that the Labor Board's treatment of this issue not only comports with the general principles underlying section 8(b)(1)(B),[40] but that it represents the only reasonable manner of resolving the problem. Were the Board to have permitted the union to discipline those supervisors who formed the Association, it would have subverted much of the protective effect provided the Employer by its determination that section 8(b)(1)(B) was violated by the imposition of fines upon those foremen who performed rank-and-file work during the strike. The formation of the Association was part and parcel of the supervisors' efforts to further the bargaining interests of their Employer during the work stoppage. It had its primary genesis in the illegal position of Local 134 regarding the performance of struck work by the Employer's representatives,[41] and, as the Labor Board properly recognized, it would have been wholly irrational for it to ignore this important causative connection. We therefore affirm this aspect of the N.L.R.B.'s decision.

III

The Labor Board wholly adopted the Trial Examiner's determination that the International Union violated sec-

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[40] *See* Part I(A) and II(A) of this opinion, *supra*.

[41] Although one of the Association's obvious interests concerned the legality of the union-security provision in the Company-Local 134 collective bargaining agreement, it is important to recognize that it was the strike which precipitated the supervisors' concern regarding this issue. It was not until they realized that Local 134 intended to utilize their forced union membership to subvert their loyalty to the Employer that the supervisors undertook to form the Association to protect their position, as well as the interests of their Employer.

tion 8(b)(1)(B) of the N.L.R.A., due to its affirmance, on appeal, of Local 134's disciplinary actions.[21] Since the International Union furthered the coercion and restraint concomitant with Local 134's unlawful conduct (1) by affirming the imposition of the fines despite claims of illegality *specifically raised* by the appealing supervisor/members and (2) by retaining records of these adverse measures which might, in the future, inhibit the performance of supervisory and managerial functions by foremen in accordance with the undivided loyalty owed by them to their Employer,[22] we affirm this Board conclusion.

To rectify the effects of the unfair labor practice, the Labor Board issued the usual cease and desist order, and it affirmatively required *both* unions (1) to rescind the illegally imposed fines and expunge all records pertaining thereto; (2) to provide separate written notices for each disciplined supervisor; and (3) to reimburse the foremen for any fines already paid by them. However, with respect to the individual written notice requirement and the provision concerning the reimbursement of already collected fines, the Board only imposed secondary responsibility upon the International Union, with Local 134 being held primarily responsible.

It is clear that the Board's entire remedial order concerning Local 134 is within the broad remedial discretion

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[21] *International Brotherhood of Electrical Workers and Local 134, I.B.T.W.*, 192 NLRB No. 17, slip op. at 6-7, 1971 CCH NLRB ¶ 23,282 (1971).

[22] *See Meat Cutters Union Local 81 of the Amalgamated Meat Cutters and Butcher Workmen of North America* v. *N.L.R.B.*, —— U.S.App.D.C. ——, ——, 458 F.2d 794, 799-800 (1972); *N.L.R.B.* v. *Toledo Locals Nos. 15-P* and *272 of the Lithographers and Photo-Engravers International Union*, 437 F.2d 55, 57 (6th Cir. 1971); *San Francisco-Oakland Mailers' Union No. 18, International Typograhical Union*, 172 NLRB No. 252, slip op. at 2-3, 1968-2 CCH NLRB ¶ 20,195 (1968).

which it is granted under section 10(c) of the Act.[53] We also believe that the Labor Board's order is wholly appropriate to the extent that it requires the International Union to cease and desist from its unlawful conduct, to rescind all of the illegal fines and expunge all records pertaining thereto, and to ensure that individual written notices are provided each disciplined foreman.[54] However, we are unable to agree with the Board's imposition of monetary liability upon the International Union for the fines which have already been collected by Local 134.

All of the union disciplinary charges concerning the improperly fined supervisors were brought at the Local 134 level. The disciplinary fines were similary imposed at the Local 134 level, and only Local 134 has sought to collect them. The International Union's sole action with respect to the fines imposed by Local 134 consisted of its affirmance of them on appeal.[55] Since there is no evidence indicating that the International Union did not exercise good faith when it reviewed Local 134's conduct on appeal, we find that the portion of the Labor Board's remedial order imposing monetary liability on the International Union with respect to the fines already collected by Local 134, was improperly adjudged and cannot be enforced.

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[53] 29 U.S.C. § 10(c) (1970). *See Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 194 (1941); *Virginia Electric & Power Co.* v. *N.L.R.B.*, 319 U.S. 533, 540 (1943); *Amalgamated Clothing Workers of America* v. *N.L.R.B.*, 125 U.S. App.D.C. 275, 281, 371 F.2d 740, 746 (1966); *Office and Professional Employees International Union, Local 425* v. *N.L.R.B.*, 136 U.S.App.D.C. 12, 19-20, 419 F.2d 314, 321-322 (1969).

[54] *Id.*

[55] No approval or specific authorization regarding Local 134's illegal disciplinary action was requested from, or given by, the International Union before or during the course of the local union proceedings. Nor did the International Union Constitution or By-laws mandate such unlawful action by local unions.

The International Union should only be held liable for the illegal fines collected by Local 134, if the local union acted as its agent. "In determining whether any person [was] acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."[36]

> This section [§ 2(13)] was enacted to eliminate the strict requirement for proof of authorization and ratification which the Supreme Court read into a somewhat comparable section of the Norris-La-Guardia Act in United Brotherhood of Carpenters and Joiners of America v. United States, 1947, 330 U.S. 395 * * * But the legislative history of § 2(13) makes plain that *Congress intended to do no more than to restore the applicability of common law agency principles of responsibility* * * *.

International Ladies Garment Workers Union v. *N.L.R.B.*, 99 U.S.App.D.C. 64, 70, 237 F.2d 545, 551 (1956) (emphasis supplied). *See Sheet Metal Workers' International Association* v. *N.L.R.B.*, 110 U.S.App.D.C. 302, 309, 293 F.2d 141, 148, *cert denied*, 368 U.S. 896 (1961).[37]

Where the *only action* taken by a national or international union is in the nature of an appellate review of the action of a local union, and the national or international union exercises its appellate function *in good faith and in the absence of fraud*, the national or international union should not be held answerable *in damages* to a member who was wrongfully disciplined by the local union.

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[36] Section 2(13) of the N.L.R.A., 29 U.S.C. § 152(13) (1970).

[37] Regarding the relevant legislative history pertaining to section 2(13), *See* H. Rep. No. 245, 80th Cong., 1st Sess. 11 (1947), in I *Legislative History* at 302; H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 36 (1947), in I *Legislative History* at 540; 93 Cong. Rec. 6442, 6534, and 6859 (1947).

See Annotation, 74 A.L.R.2d 783, 800 (1960); *Schouten* v. *Alpine*, 215 N.Y. 225, 109 N.E. 244, 246 (1915). *See also Madden* v. *Atkins*, 4 N.Y. 2d 283, 174 N.Y.S. 2d 633, 151 N.E.2d 73 (1958). Since there is no claim that the International Union in the instant case did not exercise its review function in good faith and in the absence of fraud,[*] we believe that the Labor Board improperly imposed monetary liability upon it.[**] We therefore deny enforcement to that portion of the Labor Board's remedial order which imposes monetary liability upon the International Union with respect to the illegal disciplinary fines already collected by Local 134, believing that under the particular facts of this case, the imposition of such liability would

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[*] Although the N.L.R.B. argues that the International Union should be held monetarily responsible due to the Board's assertion that the fines imposed by Local 134 were "illegal on their face," we reject this contention. Labor Board and court decisions had not previously defined this extremely difficult area with such exactness that the International Union could reasonably be considered to have affirmed *obviously* unlawful action by Local 134.

We intimate no view concerning the proper liability of a national or international union in a case where it does affirm a local union's disciplinary action on appeal, where it *is* clear that the local union's action is unlawful *on its face*, preferring to leave the resolution of this issue to a more appropriate occasion.

[**] [The International Union's] only action in the case was the exercise of its function to hear the appeals[s] and review the action[s] of the local body. * * * [The International Union] could not be held liable in damages to the [disciplined supervisor/members] because it affirmed [Local 134's actions,] in the absense of fraud or bad faith.

People ex rel. Solomon v. *Brotherhood of Painters, Decorators and Paperhangers*, 218 N.Y. 115, 112 N.E. 752, 754 (1916).

not meaningfully effectuate the policies of the N.L.R.A.[20] However, in all other respects, the remedial order of the Labor Board is enforced in full.

IV

The Association has challenged that portion of the Labor Board's decision which upheld the Trial Examiner's refusal to permit the Association to amend the complaint on the last day of the unfair labor practice hearings, to include the allegation that the Company-Local 134 union-security agreement was in violation of section 8(a)(3)(i) of the Act.[21] We must reject this contention.

In May of 1968, the Association filed an unfair labor practice charge with the appropriate regional office of the N.L.R.B., contending that the union-security provision in the collective bargaining agreement between Local 134 and the Company was illegal under section 8(a)(3)(i) of the Act, since it covered a unit which included both supervisors and rank-and-file employees. The Regional Director refused to issue a complaint relating to the Association's charge, and the General Counsel of the Labor Board upheld that decision on appeal.[22] On June 10, 1969, the instant section 8(b)(1)(B) case was instituted by the Association. However, neither its charge nor the complaint which was issued pursuant thereto, referred in any manner to the legality of the union-security provision. It was

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[20] *See section* 10(c), 29 U.S.C. § 160(c) (1970). The decisions cited by the N.L.R.B. in support of the imposition of monetary responsibility upon the International Union here are not apposite, since they entailed a greater degree of participation by the international unions involved. *See, e.g., N.L.R.B.* v. *Millwrights, Local 2232*, 277 F.2d 217, 221 (5th Cir. 1960), *cert. denied*, 366 U.S. 908 (1961); *Local 984, International Brotherhood of Teamsters* v. *Humko Co., Inc.*, 287 F.2d 231, 242 (6th Cir.), *cert. denied*, 366 U.S. 962 (1961).

[21] *See* note 7, *supra*.

[22] *See* note 8, *supra*.

not until the afternoon of the fourth and final day of the hearings before Trial Examiner Reel, that the Association raised this issue with respect to the section 8(b)(1)(B) proceedings. It noted that the collective bargaining agreement containing the challenged provision had already been admitted into evidence, and it argued that the Trial Examiner should resolve the question concerning the provision's legality. The counsel for the General Counsel did not join in, or even consent to, the Association's motion to amend the complaint. The Trial Examiner noted the fact that the General Counsel had previously refused to issue a complaint concerning the legal issue raised by the proposed amendment,[43] and he concluded that it would not be appropriate or advisable to permit such a "far reaching question" to enter the present litigation through the "back door."[44] The Labor Board fully adopted this determination.

In refusing to permit the Association's requested amendment, the Trial Examiner assumed that he possessed the authority under section 10(b) of the Act[45] to permit

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[43] Although the prior charge filed by the Association had alleged a section 8(a)(3) violation, while the proposed amendment suggested a section 8(b)(2) violation, the two charges were based upon the identical allegation that the Company-Local 134 union-security agreement was in violation of the requirements of section 8(a)(3)(i). *See* note 7, *supra*.

[44] *See International Brotherhood of Electrical Workers and Local 134, I.B.E.W.*, 192 NLRB No. 17, T.X.D. slip op. at 13, 1971 CCH NLRB ¶ 23,282 (1971). The Trial Examiner also indicated that such union-shop provisions had been present in similar cases recently before the Labor Board, without any indication by it that such agreements might be violative of the N.L.R.A. *Id.*

[45] 29 U.S.C. § 160(b) (1970) provides *inter alia*: "Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon." The scope of this language, which was part of the

such an amendment. Without intimating any view concerning the correctness of this assumptive interpretation,[46] we affirm the decision of the Labor Board, because we do not believe that its determination concerning the proposed amendment can reasonably be considered to be an abuse of discretion.[47]

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[45] (continued)
original 1935 Wagner Act, may have been limited, however, by the enactment in 1947 of an amendment to the N.L.R.A., which provides that the General Counsel "shall have final authority, on behalf of the Board, in respect of the investigation of charges and *issuance of complaints* under section 160 of this title, and in respect of the prosecution of such complaints before the Board, * * *" Section 3(d), 29 U.S.C. § 153(d) (1970) (emphasis supplied). *See International Union of Electrical, Radio and Machine Workers* v. *N.L.R.B.*, 110 U.S.App.D.C. 91, 94-95, 289 F.2d 757, 760-761 (1960). *See also* cases cited note 65, *infra*.

[46] *Compare International Union of Electrical, Radio and Machine Workers* v. *N.L.R.B.*, 110 U.S.App.D.C. 91, 94-95 289 F.2d 757, 760-761 (1960) and *N.L.R.B.* v. *Raytheon Co.*, 445 F.2d 272, 274 (9th Cir. 1971), *with Frito Co., Western Division* v. *N.L.R.B.*, 330 F.2d 458, 465 (9th Cir. 1964) and *United Packinghouse, Food and Allied Workers International Union* v. *N.L.R.B.*, 135 U.S.App.D.C. 111, 119 n.12, 416 F.2d 1126, 1134 n.12, *cert. denied*, 396 U.S. 903 (1969).

For the purposes of *this case*, we accept the Labor Board's assumption, due to the fact that we "must judge the propriety of [its] action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). *See Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-169 (1962).

[47] Even the Association concedes that at most, the Board and Trial Examiner were only "under a duty to exercise sound discretion * * *" Brief for the Association at 16.

> [The Association's proposed amendment] encompasse[d] charges identical to those [it had previously] filed with the General Counsel; the General Counsel [had] refused to issue a complaint. We would not entertain a frontal attempt to review the General Counsel's decision, Retail Store Employees Union, Local 954 v. Rothman, 112 U.S.App.D.C. 2, 4, 298 F.2d 330, 332 (1962), and have not been convinced to review [it] here, through the back door.

Retail Clerks Union 1059, R.C.I.A. v. *N.L.R.B.*, 121 U.S. App.D.C. 140, 141 n.1, 348 F.2d 369, 370 n.1 (1965). *See International Union of Electrical, Radio and Machine Workers* v. *N.L.R.B.*, 110 U.S.App.D.C. 91, 94-96, 289 F.2d 757, 760-762 (1960).

This is certainly not a case where the Labor Board has refused to decide a *material* issue which was *fairly tried* by the parties. *See American Boiler Manufacturers Association* v *N.L.R.B.*, 366 F.2d 815, 821 (8th Cir. 1966). *See also Frito Co., Western Division* v. *N.L.R.B.*, 330 F.2d 458, 465 (9th Cir. 1964); *American Boiler Manufacturers Association* v. *N.L.R.B.*, 404 F.2d 547, 556 (8th Cir. 1968), cert. denied, 398 U.S. 960 (1970). The union-security provision in question was only admitted into evidence as part of the applicable collective bargaining agreement. There was no indication, until the end of the proceedings, that its legality was sought to be in issue. The entire unfair labor practice hearing concerned solely the Section 8(b)(1)(B) case. Furthermore, we do not believe that the resolution of the question raised by the Association's proposed amendment to the section 8(b)(1)(B) complaint would have been as straightforward as it now asserts. *Cf. Nassau and Suffolk Contractors Association, Inc.*, 118 NLRB 174, 181 n.23 (1957). Under these circumstances, we are unable to conclude that the Trial Examiner abused any discretion which he might have possessed,[*] and we therefore affirm

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[*] *See* notes 65 and 66, and accompanying text, *supra*.

the refusal of the Labor Board to permit the Association's proffered amendment to the complaint.[*]

The decision of the Labor Board is affirmed in its entirety, and enforcement of its remedial order, *as modified* by this opinion with respect to the monetary responsibility of the International Union concerning the illegal fines already collected by Local 134, is hereby granted.

Judgment accordingly.

WRIGHT, *Circuit Judge, concurring in part and dissenting in part*: The opinion of my brethren in the majority is so carefully written and closely reasoned that I hesitate to express any disagreement with it. Indeed, insofar as the majority absolves the International of monetary liability and upholds the trial examiner's decision not to permit any amendment to the complaint, I concur in its judgment. But in this age of "strict constructionism" I simply cannot bring myself to believe that the words of Section 8(b)(1)(B) mean what the majority says they mean.

I am not suggesting that the Taft-Hartley Act need invariably be given a rigid or literal construction. Labor legislation does not always lend itself to the "plain meaning" school of jurisprudence. *Cf. NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 179 (1967). But I am suggesting that it is improper for this court to condone a major shift in federal labor policy when the Labor Board can point to nothing in the words of the the statute, nothing in its legislative history, and nothing in the ascertainable congressional purpose to support its action. "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results

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[*] We, of course, intend to intimate no opinion concerning the legality of a voluntary union-security provision covering a unit which includes both supervisors and rank-and-file employees. Nor do we foreclose the filing of a new charge by the Association challenging the propriety of any presently existing Company-Local 134 union-security agreement.

in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965). In my view, the determination whether supervisory personnel who are members of a union need protection from union discipline is one "properly made by Congress." For the moment, at least, Congress has decided not to grant supervisors this protection. *Cf.* 29 U.S.C. § 152(3) (1970); *Carpenters District Council of Milwaukee County* v. *NLRB*, 107 U.S.App.D.C. 55, 57, 274 F.2d 564, 566 (1959). Until Congress changes its mind, I do not believe it proper for the Board to graft such protection onto the Act by twisting the clear meaning of an unrelated provision so as to serve a purpose which Congress never intended. I must, therefore, dissent from that portion of the majority's opinion and judgment which enforces the Board's Section 8(b)(1)(B) order.

I

Section 8(b)(1)(B), 29 U.S.C. § 158(b)(1)(B), provides: "It shall be an unfair labor practice for a labor organization or its agents • • • to restrain or coerce • • • an employer in the selection of his representatives for purposes of collective bargaining or the adjustment of grievances • • •." The purpose of this provision is clear on its face. It is designed to prevent unions from restricting management's free choice of its agent to bargain with the union or adjust grievances. As Senator Taft explained on the Senate floor, "This unfair labor practice • • • is not perhaps of tremendous importance, but employees cannot say to their employer, 'We do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y.' That has been done. It would prevent their saying to the employer, 'You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you have to fire him, or we will not go to work.'" 2 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT (hereinafter "Legis. Hist.") 1012 (1948). *See also* Senate Report No. 105 on S. 1126, 80th Cong., 1st Sess., 21, in 1 Legis. Hist. 407, 427;

speech of Senator Ellender, 2 Legis. His. 1077.[1]

That is the way Section 8(b)(1)(B) was interpreted for over 20 years after its initial enactment,[2] and during this entire period no one so much as suggested that it had any broader application.[3] Then, beginning in 1968, the Labor Board started to erode the original understanding as to the limits of Section 8(b)(1)(B). The process began with the Board's decision in *San Francisco-Oakland Mailers' Union No. 81*, 172 NLRB No. 252 (1968). In *Oakland Mailers*, management charged the union with attempting to discipline a foreman for the manner in which he interpreted the collective bargaining contract. Although there was no allegation that the union was attempting to coerce the employer into hiring a new representative for collective

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[1] The majority's assertion to the contrary notwithstanding, there is not so much as a word in the legislative history of this or any other section of the Taft-Hartly Act which indicates that § 8(b)(1)(B) was intended to go further and protect supervisors from union discipline. In fact, Congress made quite clear that it had no intention to interfere with the disciplinary activity of unions against members. *See, e.g.*, S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., 20, in 1 Legis. Hist. at 426.

[2] *See, e.g., Iron Workers Union* v. *Perko*, 373 U.S. 701, 708 (1963); *Cheney California Lumber Co.* v. *NLRB*, 9 Cir., 319 F.2d 375, 381 (1963); *NLRB* v. *Puerto Rico Rayon Mills, Inc.*, 1 Cir., 293 F.2d 941, 947 (1961); *Local 294, Int. Brhd of Teamsters*, 2 Cir., 284 F.2d 893 (1960); *NLRB* v. *Int. Ladies Garment Workers Union*, 3 Cir., 274 F.2d 376 (1960); *Brhd of Teamsters & Auto Truck Drivers Local No. 70*, 183 NLRB No. 137 (1970).

[3] Thus until recently it seems to have been assumed that, while management was entitled to insist on nonunion supervisory personnel, a union was free to discipline supervisors who were union members. *See, e.g., Int. Typographical Union Local 38* v. *NLRB*, 1 Cir., 278 F.2d 6, 12 (1960), *affirmed by equally divided Court*, 365 U.S. 705 (1961).

bargaining and adjustment of grievances, the Board nonetheless found a Section 8(b)(1)(B) violation. The union's actions, according to the Board, "were designed to change the [company's] representatives from persons responsive or subservient to [the union's] will" Slip opinion at 2. This was the sort of pressure which Section 8(b)(1)(B) was designed to prevent. "That [the union] might have sought the substitution of attitudes rather than persons, and may have exerted its pressure upon the [company] by indirect rather than direct means, cannot alter the ultimate fact that pressure was exerted here for the purpose of interfering with the [company's] control over its representatives. Realistically, the [company] would have to replace its foremen or face *de facto* nonrepresentation by them." *Id.* at 3.

Standing alone, the *Oakland Mailers* doctrine place a permissible gloss on the statute.[4] Although Section 8(b)(1)(B) speaks literally in terms of coercing the "selection" of employer representatives, it is clear that management's right to a free selection would be hollow indeed if the union could dictate the manner in which the selected representative performed his collective bargaining and grievance settlement duties. But *Oakland Mailers* was not permitted to stand alone. After pausing briefly to consolidate its gains,[5] the Board again moved to expand

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[4] Indeed, when a union disciplines a supervisor with the specific intent of forcing management to replace him, the union's conduct falls within the core prohibition of § 8(b)(1)(B). *See, e.g., Dallas Mailers Union, Local 143* v. *NLRB*, 144 U.S.App.D.C. 254, 445 F.2d 730 (1971).

[5] The Board won judicial approval of the *Oakland Mailers* doctrine in *Dallas Mailers Union, Local No. 143* v. *NLRB, supra* note 4; *NLRB* v. *Sheet Metal Workers Int. Assn., Local 49*, 10 Cir., 430 F.2d 1348 (1970); and *NLRB* v. *Toledo Locals Nos. 15-P & 272 of Lithographers etc.* Union, 6 Cir., 437 F.2d 55 (1971). The doctrine was applied without essential change in *New Mexico District Council of Carpenters & Joiners and Galen R. Wilson*, 176 NLRB

the contours of the statute. In *Meat Cutters Union Local 81* 185 NLRB No. 130 (1970), the Board found a Section 8(b)(1)(B) violation when a union attempted to discipline a supervisory employee for obeying a company order to institute a new meat procurement policy. *Meat Cutters* differed from *Oakland Mailers* in that no one claimed that the new procurement policy had anything to do with the supervisors' grievance settlement or collective bargaining functions.[4] It was thus unclear how management could claim that even a "substitution of attitudes" as to these functions had occurred. To be sure, a supervisor might be indirectly influenced in his bargaining and grievance settlement duties by union discipline exacted for his

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[3] (continued)
797 (1969); *New Mexico District Council of Carpenters & Joiners and Marvin Freese*, 177 NLRB 500 (1969); *Houston Typographical Union No. 87*, 182 NLRB 592; and *Freight, Construction, General Drivers, etc. Union, Local 287*, 183 NLRB No. 49 (1970).

[4] Superficially, *Meat Cutters* might appear similar to *NLRB* v. *Sheet Metal Workers Int. Assn., Local 49, supra* note 5. In *Sheet Metal Workers* the Board found a § 8(b)(1)(B) violation when the union fined a supervisor for performing rank-and-file work ostensibly unrelated to his collective bargaining and grievance adjustment functions, and the 10th Circuit enforced the Board's order. However, a close examination of that case makes clear that the fine was imposed because the supervisor interpreted the union contract in a manner which permitted him to perform the rank-and-file work. *See also NLRB* v. *Toledo Locals Nos. 15-P & 272 of Lithographers etc. Union, supra* note 5. Contract interpretation is, of course, part of a supervisor's grievance settlement duties. In *Meat Cutters* no claim was made that the supervisors were engaged in their grievance settlement functions when they elected to obey the management order to institute a new meat procurement policy.

conduct in an unrelated area.' But this danger exists whenever a union disciplines a supervisor, and the Board had explicitly rejected a *per se* ban on all union discipline of supervisory employees. *See Local Union 453, Brhd of Painters, Decorators & Paperhangers,* 183 NLRB No. 24 (1970). Nonetheless, the Board read into the Act a congressional intent to require the undivided loyalty of supervisors to management in the performance of all their management functions and, on the basis of this reading, found a Section 8(b)(1)(B) violation.

When *Meat Cutters* was appealed to this court, we were clearly concerned that the Board's Section 8(b)(1)(B) decisions might be deteriorating into a flat prohibition against any union discipline of supervisors, thus giving supervisory personnel all the benefits of union membership without having to bear any of the responsibilities. In its *Meat Cutters* brief the Board sought to meet these fears and dispel them. "[I]t is only when the representative's obligations to the union conflict with his management responsibilities that his union obligations are compelled to yield," the Board argued. "Thus, in each case, including the instant case, where the Board has found a Section 8(b)(1)(B) violation based on union discipline of a management representative, the conduct which prompted disciplinary action consisted of the representative's efforts to discharge his management responsibilities. • • • In fact, the Board has recently dismissed a Section 8(b)(1)(B) complaint on the ground that the infraction of union rules for which the employer representative was disciplined did not involve the exercise of supervisory or managerial authority." NLRB brief in *Meat Cutters Union Local 81* v. *NLRB,* ——U.S.App.D.C.——, 458 F.2d 794 (1972), at 15.

' The case would have been considerably easier if the Board had found that the supervisors were disciplined *with the intent* to influence their collective bargaining and grievance settlement decisions. *Cf. Local Union No. 453, Brhd of Painters, Decorators & Paperhangers,* 183 NLRB No. 24 (1970). But no such finding was made.

Partially on the basis of these representations we enforced the Board's decision, but with the explicit caveat that "[t]he rule here applied by the Board only affects union discipline which is imposed upon a member, who has responsibilities as a representative of his employer in administering the collective bargaining agreement or the adjustment of employee grievances, because he has performed duties as a management representative. * * * The N.L.R.B. has made it clear that a union may legally discipline a supervisor-member for acts which are *not* performed by the individual in furtherance of his obligations as the employer's representative." *Meat Cutters Union Local 81* v. *NLRB, supra*——U.S.App.D.C. at——— n.12, 458 F.2d at 798-799 n. 12. (Emphasis in original.)

After this warning, I would have supposed it would be obvious to the Board that Section 8(b)(1)(B) had already been expanded to its limits. Yet the Board now seeks to expand it once again, this time by reading it in a way which, in the words of the learned trial examiner, "stretch[es] the statute beyond what I would otherwise consider the breaking point." *Int. Brhd of Electrical Workers*, 192 NLRB No. 17 (1971) (trial examiner's decision at 11). Despite the Board's explicit assurance that it would find Section 8(b)(1)(B) violations only when supervisors were fined for "the exercise of supervisory or managerial authority," the Board has here applied the statute to fines levied against supervisors for performance of ordinary rank-and-file work—work which could not possibly be considered to fall within their ordinary managerial responsibilities. This reading of the statute goes beyond *Oakland Mailers*, beyond *Meat Cutters*, and beyond anything which the Board has ever suggested in the past.[1]

[1] Once before, the Board applied § 8(b)(1)(B) to union fines of supervisors doing rank-and file struck work. *See Toledo Locals Nos. 15-P & 272 of Lithographers etc. Union* 175 NLRB 1072 (1969), enforced, 6 Cir. 437 F.2d 55 (1971). However, in the *Toledo* case the supervisors were fined for interpreting the contract in a manner which per-

As the trial examiner pointed out, the previous cases are all

> "readily distinguishable here where the action for which the supervisors were fined bore no direct relation to their work as supervisors or to any interpretation of the contract. As an original proposition I would be inclined to construe Section 8(b)(1)(B) as interdicting union fines of supervisors only when the conduct for which the supervisor was fined bore some relation to his role as a representative of management in 'collective bargaining or the adjustment of grievances,' to quote Section 8(b)(1)(B). In the instant case the question confronting the supervisors whether to work or to respect the strike call of their Union was in no way related to those subjects. Moreover, the Company itself has made it clear that it was not demanding that its supervisors work during the strike. On the contrary, the Company expressly left the decision up to each individual supervisor, with specific assurances that no reprisal would be visited on those who chose not to work. After the strike the Company promoted some of the supervisors who had not worked during the strike. I therefore find some difficulty in concluding that the Company was restrained or coerced by the Union's action in fining the supervisors who worked, or even in finding that the Union's action had any natural or inherent tendency to restrain or coerce the Company. • • •"

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[9] (continued)
mitted them to perform the work. *See* 437 F.2d at 57. Since contract interpretation is clearly a part of a supervisor's normal grievance settling duties, the *Toledo* case is easily distinguishable. *See* note 6 *supra*.

192 NLRB No. 17 (trial examiner's decision at 9).*

Like the trial examiner, I also find "some difficulty" in so concluding. In fact, as I hope to show in Part II of this opinion, the Board's present interpretation of Section 8(b)(1)(B), in spite of its explicit language, makes it an essentially limitless prohibition against any union discipline of supervisory personnel. Moreover, as Part III will show, this expansion of the statute is in the teeth of explicit Supreme Court decisions which give it a narrower scope. Finally, as I will argue in Part IV, the Board's reading of the statute finds no support in the policy of the Taft-Hartley Act and cannot be justified by reference to the Board's discretion in administering federal labor legislation.

II

It seems to be conceded by all parties that, at least in theory, Section 8(b)(1)(B) does not absolutely proscribe all union discipline of supervisors who are union members. *See* majority opinion at note 28. Indeed, the Board so held in *Local Union 453, Brhd of Painters, Decorators & Paperhangers, supra*, and Judge MacKinnon's opinion in

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* Although plainly reluctant to find a § 8(b)(1)(B) violation, the trial examiner nevertheless felt compelled to do so because of the Board's prior decision in *New Mexico District Council of Carpenters & Joiners and Galen R. Wilson, supra* note 5. A close look at *New Mexico District Council*, however, makes clear that that case is inapposite. The Carpenters & Joiners Union was held to have violated § 8(b)(1)(B) when it disciplined a supervisor who co-signed a letter urging employees to vote with management in a union election. Obviously, it is part of a supervisor's collective bargaining duties to urge management's viewpont on union members. The board's holding in *New Mexico District Council* is therefore squarely within the *Oakland Mailers* rule. It is far from obvious, however, that a supervisor's ordinary duties include performance of rank-and-file work. *See* text at note 10-11 *infra*.

Meat Cutters expressly approved the *Local Union 453* decision. *See*——U.S.App.D.C. at——n.12, 458 F.2d at 798-799 n.12. The Taft-Hartley Act does not compel supervisors to become union members, and an employer is within his rights if he insists that supervisory personnel remain nonunion. But if supervisors are permitted to join a union, they receive certain benefits from their union membership and incur certain concomitant obligations. Surely it cannot be doubted, for example, that a union could discipline a supervisor for refusing to pay his dues, for deliberately disrupting union meetings, or, to cite an example used by the trial examiner, for refusing to join a union bowling league.

To be sure, as *Oakland Mailers* makes clear, there are also some supervisory activities which Section 8(b)(1)(B) makes immune from union discipline. A supervisor-union member is in the difficult position of simultaneously serving two masters. Any sensible interpretation of the statute must, therefore, involve a determination of what obligations a supervisor owes to his union and what obligations he owes to his employer.

In its opinion today, the majority purports to adhere to these principles. It suggests that a supervisor is immune from union discipline only when he is performing "management functions" and that when he is engaged in "non-management" activity the union is free to impose reasonable fines. Unfortunately, however, the majority nowhere defines precisely what it means by "management functions" and it is clear from the way in which the test is applied that it in fact imposes no limits at all on the reach of Section 8(b)(1)(B).

At the outset, it should be clear that the "management function" test does not mean what this court has taken it to mean in the past. In *Meat Cutters* we upheld the Board's unfair labor practice finding because the supervisors were fined for engaging in usual and traditional management activity. But no one contends that the super-

visors in this case were performing functions which supervisors usually or traditionally perform. The record shows that these supervisors were engaged in rank-and-file struck work which, under normal circumstances, was the responsibility of the ordinary employees. Saying that rank-and-file labor is an ordinary management function is like saying that black is white.[10] The two are usually perceived as diametrical opposities, so that if the one is taken to include the other, the concepts lose all meaning. *Cf. General Tire & Rubber Co.* v. *NLRB*, 1 Cir., 451 F.2d 257, 258-259 (1971).[11]

Perhaps the majority means to suggest that the supervisors are engaged in a "management function" whenever

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[10] Thus, as the majority itself concedes, " 'Rank-and-file work' concerns that work which is ordinarily performed by regular, non-supervisory employees in the bargaining unit." Majority op. at note 4. Inasmuch as the majority also concedes that supervisors can be fined for their nonsupervisory activities, majority op. at note 28, it is difficult to understand the theory under which fines for performance of rank-and-file work are proscribed.

[11] It is interesting that none of the conduct for which these supervisors were punished fell within the description of supervisory functions contained in the Act. Section 2 (11) of the Act, 29 U.S.C. § 152(11) provides: "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Since these "supervisors" were performing none of these functions at the time when discipline was imposed, but rather were assigned to ordinary rank-and-file work, it could be argued that they were not then supervisors within the meaning of the Act and, hence, were not within the ambit of § 8(b)(1)(B).

they take action pursuant to a management order. It should be noted, however, that this reading of the statute is at war with the notion that a supervisor undertakes certain duties when he joins a union and that these duties are enforceable by appropriate union sanctions. Suppose, for example, that management orders its supervisors to disrupt a lawful union meeting. Could it seriously be argued that the union must tolerate this disturbance without taking disciplinary action because the supervisors were merely "following orders"? If, as argued above, Section 8(b)(1)(B) leaves intact some duties which supervisor-members owe to their unions, then it cannot be that these duties can be abrogated merely because management orders their abrogation. Moreover, even if the management order test were a defensible limiting principle, it would not support the Board's decision in this case. As the majority itself points out, there *was* no management order here requiring supervisors to perform rank-and-file work. On the contrary, management explicitly informed the supervisors that they would not be required to cross the picket line during the strike, and several supervisors who declined to do so were subsequently promoted.

My brethren seek to avoid this embarrassment by suggesting that the proper test is not whether the supervisors acted pursuant to a management order, but rather whether their actions were undertaken *in the interests* of management. It should be apparent, however, that this test fares no better as a limiting principle than the management order test. In fact, to the extent that management and union are viewed as adversaries, it is *always* in management's interests for the supervisors to take actions which weaken the union. For example, it might well be in management's interest for the supervisors to stop paying their union dues, thereby depleting the union's financial resources and limiting its strike capability. Yet all concede that it would be intolerable for supervisors to retain all the benefits of union membership without any enforceable duty to bear some of the financial burdens.

The "management interest" test also fails to justify the actions of the Board concerning the Bell Supervisors Association issue. The Board found that the union committed a Section 8(b)(1)(B) violation when it fined the supervisors for forming the so-called "Bell Supervisors Protective Association." The Protective Association was formed in part for the purpose of prosecuting an unfair labor practice charge against the company.[13] Thus if one wishes to explain this case in terms of a "management interest" standard, it must be contended that the company had an interest in prosecuting an unfair labor practice against itself!

I submit that there is something inherently wrong with a mode of statutory analysis that yields a product as nonessential as this. This court purports to limit Section 8 (b) (1) (B) to union discipline for performance of management activities ordered by management or taken in the interests of management. Yet it then proceeds to apply the provision to a nonmanagement activity not ordered by management and directly contrary to management's interests. I am forced to conclude that the unfair labor practices found in this case are ultimately explicable only if one assumes that all union fines of supervisor-members are unlawful on their face. But that is the one theory which my brethren explicitly disavow and which the statute will not permit.

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[13] On May 21, 1968, the Protective Association filed an unfair labor practice charge, No. 13-CA-8451, alleging that the company's collective bargaining contract was illegal because the union security clause required that supervisory and nonsupervisory personnel be placed in the same collective bargaining unit. The General Counsel refused to prosecute the complaint, citing *Nassau & Suffolk Contractors Assn., Inc.*, 118 NLRB 174, 177-184 (1957). *See* Joint Appendix at 201-202. Subsequently, the Protective Association attempted to amend its § 8(b)(1)(B) complaint so as to include a similar charge against the union. *See* JA at 184-185. The trial examiner refused to permit the amendment, and we uphold that decision today. *See* majority op. at 31-35.

III

The Board's rough sailing through the complexities of Section 8 (b) (1) (B) might, perhaps, be more understandable if the seas were entirely uncharted. But in fact union discipline of strikebreakers and other dissidents has been the subject of a series of important Supreme Court decisions which the Board inexplicably chose to ignore. These decisions, unlike the Board's approach, set out a rational, workable interpretation of Section 8 (b) (1) which balances the union's right to enforce reasonable discipline against the rights of employers and union members to be free from union overreaching. They should, I think, control the outcome of this case.

The first and most important of these decisions is *NLRB* v. *Allis-Chalmers Manufacturing Co., supra.* In all relevant respects, *Allis-Chalmers* is indistinguishable from this case. There, as here, the union sought to impose reasonable fines on union members who had crossed a picket line during a lawful strike. In *Allis-Chalmers*, however, none of the fined members were supervisors, so the relevant provision governing the union's conduct was subsection (A) of Section 8 (b) (1) rather than subsection (B).[11] However, when the Supreme Court found the union innocent of any unfair labor practice, it did so not because of anything in subsection (A), but rather because of its interpretation of the words "restrain or coerce" which are common to subsections (A) and (B). *See* Christensen, *Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Democracy,* 43 N.Y.U. L. Rev. 227, 268 (1968). Thus the Court stated: "It is highly unrealistic to regard § 8 (b) (1), *and particularly its words 'restrain or coerce,'* as precisely and unambiguously covering

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[11] Section 8 (b) (1) (A), 29 U.S.C. § 158 (b) (1) (A), provides, in relevant part: "It shall be an unfair labor practice for a labor organization or its agents • • • to restrain or coerce • • • employees in the exercise of the rights guaranteed in section 157 of this title • • •."

the union conduct involved in this case." 388 U.S. at 179. (Emphasis added.) On the contrary, such a reading of Section 8 (b) (1) would "attribute to Congress an intent at war with the understanding of the union-membership relation which has been at the heart of its effort 'to fashion a coherent labor policy' and which has been a predicate underlying action by this Court and the state courts. More importantly, it is to say that Congress limited unions in the powers necessary to the discharge of their role as exclusive statutory bargaining agents by impairing the usefulness of labor's cherished strike weapon." *Id.* at 183.

Of course, *Allis-Chalmers* did not mean that unions were free to impose discipline for any purpose at all. Section 8 (b) (1) must be read so as to conform with the other provisions of federal labor law. *See, e.g., NLRB* v. *Int. Ladies' Garment Workers Union*, 3 Cir., 274 F.2d 376 (1960); Silard, *Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers and Scofield*, 38 GEO. WASH. L. REV. 187, 193-196 (1969). Thus if a union rule "invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating § 8 (b) (1)." *Scofield* v. *NLRB*, 394 U.S. 423, 431 (1969). *See NLRB* v. *Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418 (1968). But if one thing is clear after *Allis-Chalmers*, it is that there is no "overriding policy of the labor laws" which prohibits reasonable union fines levied against members who cross a lawful picket line to perform rank-and-file struck work. In fact, quite the contrary is true.

> "Integral to [the] federal labor policy has been the power in the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and '[t]he power to fine or expel

strikebreakers is essential if the union is to be an effective bargaining agent . . .' • • •"

NLRB v. *Allis-Chalmers Manufacturing Co., supra,* 388 U.S. at 181. (Footnotes omitted.)

The majority utilizes two arguments in attempting to distinguish *Allis-Chalmers.* First my brethren contend that the *Allis-Chalmers* Court relied on the proviso in Section 8 (b) (1) (A)—a proviso which is not attached to subsection (B) of Section 8 (b) (1).[14] I must admit I find it difficult to understand how the majority can maintain this position in light of the *Allis-Chalmers* Court's explicit disclaimer of any reliance on the proviso.[15] As Mr. Justice Black pointed out in dissent: "Since the union resorted to the courts to enforce its fines instead of relying on its own internal sanctions such as expulsion from membership, *the Court correctly assumes the the proviso to § 8 (b) (1) (A) cannot be read to authorize its holding.*" 388 U.S. at 200. (Emphasis added.) Only a few months ago Judge MacKinnon, speaking for a unanimous panel, characterized the holding in *Allis-Chalmers* as follows: "Instead of relying on the express language of the *proviso,* • • • the Supreme Court carefully analyzed the entire legislative history of Section 8 (b) (1) (A), and it concluded that Congress did not intend to prohibit such internal union discipline by the prohibition against 'restraint' or 'coercion.'" *Booster Lodge No. 405, Int. Assn of Machinists* v. *NLRB,* — U.S.App.D.C. —, —, — F.2d —, — (Nos.

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[14] The proviso states: *"Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein • • •."

[15] Thus the *Allis-Chalmers* plurality held: *"It is no answer* that the proviso to § 8 (b) (1) (A) preserves to the union the power to expel the offending member," 388 U.S. at 183 (emphasis added), and upheld union fines, not within the scope of the proviso, because "literal application of the imprecise words 'restrain or coerce' • • • [would produce] • • • extraordinary results • • •." *Id.* at 184.

24,687 & 24,774, decided February 3, 1972) slip opinion at 7-8). In light of this statement, I am frankly amazed to see the proviso argument resurrected at this late date."

Perhaps sensing that substantial reliance on the proviso does little to advance its position, the majority resorts to a second argument. *Allis-Chalmers*, it is argued, dealt only with internal union rules affecting the relationship between a member and the labor organization to which he belongs. Here, however, the union rule had an "effect on parties external to [the union-member] relationship" and therefore falls outside the *Allis-Chalmers* rationale. Majority opinion at 18.

This distinction is so subtle that someone in an uncharitable frame of mind might be tempted to characterize it as altogether chimerical. It seems clear, for example, that the union rule in *Allis-Chalmers* had, and was intended to have, an external effect on the employer. By deterring strikebreakers, the rule assured union solidarity and thereby allowed the union to bring greater economic

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[16] To support its argument that the proviso makes the Supreme Court's *Allis-Chalmers* decision irrelevant to § 8 (b) (1) (B) cases, the majority cites Gould, *Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of Allis-Chalmers*, 1970 DUKE L. J. 1067; 1128. This is what Professor Gould says at the page cited: "Of course, the existence of the proviso was not critical to the Court's conclusion in *Allis-Chalmers* although it did provide 'cogent support.' In *Allis-Chalmers* the Court was primarily concerned with an assessment of the language 'restrain or coerce'—language which is applicable to section 8 (b) (1) (B) as well as section 8 (b) (1) (A). Therefore, the mere failure of Congress to attach the proviso to section 8 (b) (1) (B) does not establish the conclusion that a union's internal affairs are to be excluded from consideration." Interestingly, Professor Gould ultimately concludes that under *Allis-Chalmers* § 8 (b) (1) (B) does permit unions to fine supervisor-memberss for performance of struck work. *See* 1970 DUKE L. J. at 1128-1129.

pressure on the company. I simply cannot understand why the anti-strikebreaking rule in *Allis-Chalmers* should be characterized as "internal" while precisely the same sort of anti-strikebreaking rule in this case suddenly becomes "external."

Perhaps there is nonetheless some substance to the internal-external dichotomy, but the distinction, if one exists, was apparently too subtle for the Supreme Court to grasp. In *Scofield* v. *NLRB, supra,* the Court unambiguously rejected the internal-external test as a basis for resolving Section 8 (b) (1) cases. "It is doubtless true," the Court conceded, "that the union rule in question here affects the interests of all three participants in the labor-management relation: employer, employee, and union. Although the enforcement of the rule is handled as an internal union matter, the rule has and was intended to have an impact beyond the confines of the union organization. But as *Allis-Chalmers and Marine Workers* made clear, it does not follow from this that the enforcement of the rule violates § 8 (b) (1) (A), unless some impairment of a statutory labor policy can be shown." 394 U.S. at 431-432. (Footnote omitted.) Similarly, I do not see why the external impact of this union rule should affect its validity. The majority ignores the fact that the very purpose of having a union is to affect external relations between employees and their employer. All union rules are therefore "external" since they are all designed to insure a strong and united front among union members when the union confronts its employer adversary. *Allis-Chalmers, Scofield* and *Marine Workers* stand for the proposition that such rules may nonetheless be enforced "unless some impairment of a statutory labor policy can be shown." And *Allis-Chalmers* makes clear that there is no impairment of "statutory labor policy" when, as here, a union takes reasonable action to insure strike solidarity among its members.

IV

Of course, it is true that *Allis-Chalmers dealt with fines* imposed on ordinary members while here the fines were imposed on supervisors. As argued above, this fact is without relevance to the problem of statutory construction, since the *Allis-Chalmers* Court relied on the general language of Section 8 (b) (1) which is applicable to both subsections (A) and (B). Nonetheless, the difference between the two cases might be relevant to the existence of a countervailing "statutory labor policy" which would justify finding a Section 8 (b) (1) violation. Specifically, the majority argues that, even if there is no "statutory labor policy" favoring the freedom of union members to perform struck work, there is such a policy which favors insulating supervisory personnel from union discipline.

If this argument is kept within proper bounds, I think it has some validity. Indeed, I think Section 8 (b) (1) (B) itself expresses a statutory labor policy which favors allowing supervisory personnel to perform their collective bargaining and grievance settling functions free from union coercion. That, as I understand it, was the holding of *Oakland Mailers*, and I have no quarrel with that decision. But the Board has not kept this argument within proper bounds. Instead, the Board purports to find a broader "statutory labor policy" requiring that the supervisor's absolute duty to his employer always take precedence over any conflicting duty to his union.

With all respect, I think this policy has been manufactured out of whole cloth. While the majority finds it "intuitively obvious" that such a policy exists, majority opinion at 15, it is unable to cite a single court decision, a single provision in the statute, or a single element of the

legislative history to support its conclusion.[17] To be sure, Section 2(3) of the Act allows an employer to keep his supervisors out of the union,[18] and a union may even commit an unfair labor practice if it bargains to an impasse over unionization of supervisors. *See International Typographical Union* v. *NLRB*, 1 Cir., 278 F.2d 6 (1960). But here the employer chose not to exercise his option to have nonunion supervisors. The company agreed that supervisory personnel would be union members, and Section 14 (a) of the Act makes that agreement legal.[19]

We can be safe in assuming that neither the union nor management agreed to the unionization of supervisors because of an abstract belief in the virtues of trade unionism. The union presumably insisted on this clause in the contract so that it would have some control over the ac-

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[17] The majority quotes dicta from *Carpenters District Council of Milwaukee County* v. *NLRB*, 107 U.S.App.D.C. 55, 57 274 F.2d 564, 566 (1959), to the effect that an employer is free to discharge supervisors to prevent them from joining unions. But no one is claiming that employers have a statutory obligation to allow their supervisors to become union members. Rather, the issue in this case is whether anything in the Act prohibits a union from enforcing reasonable obligations of union membership against supervisors once the employer has decided to allow his supervisory personnel to assume union membership.

[18] Section 2(3), 29 U.S.C. § 152(3) (1970), provides "The term 'employee' shall include any employee • • • but shall not include any individual employed as • • • a supervisor • • •." Section 7, 29 U.S.C. § 157 (1970), in turn, guarantees to "employees" only the right to form or join labor unions.

[19] Section 14(a), 29 U.S.C. § 164(a) (1970), provides: "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

tions of supervisors, and management presumably accepted it because the union gave up something else in return. By enacting Section 14(a) which permits supervisors to join unions, Congress expressly permitted management and labor to reach just such an agreement. *See also* 29 U.S.C. § 158(a)(3)(i) (1970). Yet now management seeks to abrogate its part of the bargain by insisting that supervisors obey management alone. Like the Supreme Court, I can "discern no basis in the statutory labor policy encouraging collective bargaining for giving the employer a better bargain than he has been able to strike at the bargaining table." *Scofield* v. *NLRB, supra,* 394 U.S. at 433.

Nor can I see a basis in federal labor policy for permitting supervisors to retain all the benefits of union membership while incurring none of the costs. As Professor Gould has pointed out:

> "• • • [S]upervisors who remain union members are most often obtaining additional benefits. Frequently, they have remained members in order to retain possession of withdrawal cards which will make it less expensive for them to re-enter the trade or another plant under union jurisdiction. Under the *Allis-Chalmers* rationale, this would seem to indicate a pledge of allegiance by the supervisor and therefore should be deemed consent by such an individual to render himself liable to financial obligations where the union's interest is direct and where the conduct engaged in is somewhat distant from basic supervisory functions. If the employer is unduly harmed by such a rule, it seems to me that its obligation is to make the supervisory position financially attractive enough for the supervisor to forego the benefits of union membership and to resign."

Gould, *Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of* Allis-Chalmers, 1970 DUKE L. J. 1067, 1129 (1970).

To be sure, the Labor Board is entitled to great deference when it interprets the act it administers. *See, e.g.*, *Brooks* v. *NLRB*, 348 U.S. 96 (1954); *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945). But this deference has its limits. In the final analysis, "administrative experience is of weight in judicial review only to this point—it is a persuasive reason for deference to the [Board] in the exercise of its discretionary powers under and within the law. It cannot be invoked to support action outside of the law. And what action is, and what is not, within the law must be determined by courts, when authorized to review, no matter how much deference is due to the agency's fact finding. Surely an administrative agency is not a law unto itself * * *." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 215 (1947) (Mr. Justice Jackson, dissenting).

In my view, the Labor Board's action in this case was outside the law. I submit that the Section 8 (b) (1) (B) requirement that unions not "restrain or coerce * * * an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances" cannot reasonably be read to prohibit discipline of union members—supervisors though they be—for performance of rank-and-file struck work. I would therefore decline to enforce the Board's order.

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UNITED STATES COURT OF APPEALS
No. 71-1559
FOR THE DISTRICT OF COLUMBIA CIRCUIT
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, AND LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, PETITIONERS
v.
NATIONAL LABOR RELATIONS BOARD, RESPONDENT
No. 71-1712

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCALS 641, 622, 759, 820, AND 1263, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

FLORIDA POWER & LIGHT COMPANY, INTERVENOR

Petitions to Review and Cross-Application to Enforce Orders of the National Labor Relations Board

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On Rehearing *En Banc*

Decided June 29, 1973

Laurence J. Cohen for petitioners in No. 71-1559.

Seymour A. Gopman for petitioners in No. 71-1712.

Daniel M. Katz, Attorney, National Labor Relations Board, with whom *Marcel Mallet-Prevost, Assistant General Counsel*, and *Warren M. Davison*, Deputy Assistant General Counsel, National Labor Relations Board, were on the brief, for respondent.

Ray C. Muller for intervenor in No. 71-1712.

Before BAZELON, *Chief Judge*, and WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB *and* WILKEY, *Circuit Judges*, sitting *en banc*.

Opinion for the court, concurred in by *Chief Judge* BAZELON and *Circuit Judges* MCGOWAN, LEVENTHAL and ROBINSON, filed by *Circuit Judge* WRIGHT, at p. 2.

Concurring opinion, in which *Circuit Judge* MCGOWAN joins, filed by *Circuit Judge* LEVENTHAL, at p. 50.

Dissenting opinion, concurred in by *Circuit Judges* TAMM, ROBB and WILKEY, filed by *Circuit Judge* MACKINNON, at p. 55.

WRIGHT, *Circuit Judge*: These cases were consolidated and heard *en banc* to resolve an important question of first impression arising under the National Labor Relations Act: Does a union commit an unfair labor practice under Section 8 (b) (1) (B), 29 U.S.C. § 158 (b) (1) (B)

(1970), by disciplining supervisor-members for crossing a picket line and performing rank-and-file struck work during a lawful economic strike against the company? The National Labor Relations Board answered the question in the affirmative and issued cease and desist and other orders against the unions involved.[1] We reverse, deny enforcement of the Board's orders, and remand both cases to the Board with instructions to dismiss the complaints.

Although the issue, as stated above, is a legal question of statutory construction, we think it helpful to have a full understanding of the factual context in which the issue arose in the two cases before us.

Florida Power & Light Co., No. 71-1712

The Florida Power & Light Company has, since 1953, maintained a collective bargaining agreement with the International Brotherhood of Electrical Workers, AFL-CIO, through the union's System Council U-4 comprising the local unions involved in this case.[2] There was no provision in the collective bargaining agreement requiring employees to become members of the union as a condition of employment, and union membership was accordingly voluntary. Section 14(a) of the Act, 29 U.S.C. § 164(a) (1970),[3] provides that an employer shall not be compelled to deem supervisors as employees for the purpose of collective bar-

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[1] *See Int. Brhd of Electrical Wkrs System Council U-4*, 193 NLRB No. 7 (1971); *Int. Brhd of Electrical Wkrs*, 192 NLRB No. 17 (1971).

[2] System Council U-4 in fact comprises 12 local unions, only 5 of which are involved in the present controversy. The Board entered its order only against the locals involved, not against the Council.

[3] "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

gaining. In addition, Section 2(3)[4] exempts supervisors, as defined in Section 2 (11),[5] from the definition of "employee" in the Act, thereby depriving supervisors of the protections of the Act and permitting an employer to refuse to hire union members as supervisors[6] and to refuse to engage in collective bargaining with its supervisors.[7] Florida Power chose not to exercise its rights under these sections and recognized the union as the exclusive bargaining representative for many of its supervisory employees. They were considered part of the bargaining unit and their wages and conditions of employment were set out in the bargaining agreement.

Other higher ranking supervisors were not represented by the union for collective bargaining purposes and did not have their wages and conditions of employment determined by the collective bargaining agreement. These included supervisors in the positions of District Supervisor, Assistant District Supervisor, Assistant Supervisor, Plant

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[4] 29 U.S.C. § 152 (3) (1970):

"The term 'employee' * * * shall not include any individual employed as * * * a supervisor * * *."

[5] 29 U.S.C. § 152(11):

"The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

[6] *See Carpenters District Council of Milwaukee County* v. *NLRB*, 107 U.S.App.D.C. 55, 57, 274 F.2d 564, 566 (1959); *A. H. Bull Steamship Co.* v. *National Marine Engineers' Beneficial Assn*, 2 Cir., 250 F.2d 332, 339 (1957); *NLRB* v. *Edward G. Budd Mfg Co.*, 6 Cir., 169 F.2d 571, 579 (1948), *cert. denied*, 335 U.S. 908 (1949).

[7] *See L. A. Young Spring & Wire Corp.* v. *NLRB*, 82 U.S. App.D.C. 327, 163 F.2d 905 (1947), *cert. denied*, 333 U.S. 837 (1948).

Superintendent, Plant Supervisor, Assistant Plant Superintendent, Distributon Assistant, Results Assistant, Assistant Plant Engineer, Substation Supervisor, and some miscellaneous supervisory classifications. The company, however, also permitted these higher ranking supervisors, many of whom had attained high ranking supervisory status after passing through the rank and file and through lower bargaining unit supervisory classifications, to maintain their union membership. It is with these high ranking supervisors who, though union members, were not represented by the union for collective bargaining purposes that the present case is concerned.[8]

Although their wages and conditions of employment were not negotiated for them by the union, these supervisors nevertheless received substantial benefits from union membership. In particular, union membership in good standing gave them the right to participate in the System Council Death Benefit Fund[9] and made them eligible for pension, disability, and death benefits under the terms of the International's constitution.[10]

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[8] The union also disciplined bargaining unit supervisors for crossing the picket line and performing rank-and-file struck work. The Board, however, did not attempt to base its unfair labor practice finding on union discipline of these members, expressly excluding this aspect of the case by stipulation. *See* Joint Appendix at 57. We might note, however, that under the Board's approach § 8(b)(1)(B) would bar union discipline of supervisor-members whose wages and conditions of employment are covered by the collective bargaining agreement. *See generally* pp. 45-46 *infra*.

[9] Under the terms of the Fund's by-laws, upon the death of any member the deceased's beneficiary would receive benefits equal to one dollar times the number of members of the Fund in good standing during the month prior to the member's death. Money with which to pay the benefits was obtained by assessing each member one dollar upon the death of any other member.

[10] These benefits were funded from the monthly dues required of every member.

A small number of the supervisors involved in this case were union members who paid no dues because they had obtained withdrawal cards from the union. Some had apparently obtained "honorary" withdrawal cards, under the terms of which the member did not actively participate in the union and did not pay monthly dues. The card constitutes a valuable benefit, however, as it permits the holder, in the event he loses his supervisory position and returns to the rank and file, to return to active membership without paying the initiation fee normally required of new members, simply by returning the withdrawal card and resuming payment of dues. It was the practice of the System Council Death Benefit Fund to permit supervisors who had obtained honorary withdrawal cards to continue their participation in the Fund. Other supervisors had apparently obtained "participating" withdrawal cards. Under the International constitution, these members could not actively participate in the union, but continued to pay a monthly fee equal to normal monthly dues, and therefore continued to remain eligible for pension, death, and disability benefits.[11]

All union members, including those on withdrawal cards,[12] bore certain obligations under the union's constitution, which provides that "[a]ny member may be penalized for committing any one or more" of 23 listed offenses. The offenses most relevant to the present case are "(10) Working in the interest of any organization or cause which is detrimental to, or opposed to, the I.B.E.W." and "(21) Working for any individual or company declared in difficulty with a [local union] or the I.B.E.W., in accord-

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[11] *See* note 10 *supra*.

[12] Art. XXVI, § 5 of the International Constitution provides:

> "The validity of any withdrawal card shall be dependent upon the good conduct of the member. • • •
>
> "A member on a withdrawal card may be subject to charges, trial and appropriate penalty in accordance with provisions of this Constitution."

ance with this Constitution." In the collective bargaining agreement, however, the union made certain concessions with respect to union discipline of supervisor-members. The contract provides:

> "• • • It is further agreed that employees in [supervisory] classifications have definite management responsibilities and are the direct representatives of the Company at their level of work. Employees in these classifications and any others in a supervisory capacity are not to be jacked up or disciplined through Union machinery for the acts they may have performed as supervisors in the Company's interest. The Union and the Company do not expect or intend for Union members to interfere with the proper and legitimate performance of the Foreman's management responsibilities appropriate to their classification. • • •"

From October 22, 1969 through December 28, 1969, the union was engaged in an economic strike against the company, and the local unions maintained picket lines at nearly all of the company's operational facilities. Many supervisor-members crossed the picket lines and performed rank-and-file struck work—that is, work normally performed by nonsupervisory employees when no strike is in progress.[13] Whether they crossed the picket line at the request of the company or totally of their own volition is not revealed in the record. The union brought charges for violations of the union's constitution, and those found guilty of crossing the picket line to perform rank-and-file struck work received fines of from $100 to $6,000. Most were also expelled from the union, thereby losing their right to continue participating in the System Council Death Benefit Fund. By expulsion they were also deprived of the membership in good standing which was a prerequisite

[13] It is conceded that the union did not fine those supervisors, if any, who crossed the picket line solely to perform their usual supervisory functions.

for receiving pension, disability, or death benefits under the International constitution.[14]

The Board found that in so disciplining supervisor-members the union violated Section 8(b)(1)(B) because the fines "struck at the loyalty an employer should be able to expect from its representatives for the adjustment of grievances and therefore restrained and coerced employers in their selection of such representatives." *Int. Brhd of Electrical Wkrs System Council U-4,* 193 NLRB No. 7 (slip opinion at 6) (1971). Accordingly, the Board ordered the union to cease and desist, rescind all fines, expunge all records of disciplinary proceedings, restore union membership, restore eligibility in all benefit plans, and post appropriate notices.

Illinois Bell Telephone Co., No. 71-1559

The Illinois Bell Telephone Company and its predecessors have, since 1909, maintained a contractual relationship with Local 134, International Brotherhood of Electrical Workers, AFL-CIO. Illinois Bell, like Florida Power, chose not to exercise its right under Sections 2(3), 2(11), and 14(a) of the Act to refuse to hire union members as supervisors. The union was recognized as the exclusive bargaining representative, not only for rank-and-file journeymen and apprentice employees, but also for employees within certain supervisory categories, including General Foreman, P.B.X. Installation Foreman, and Building Cable Foreman. These supervisors, as well as rank-and-file members of the bargaining unit, were required to become and remain members of Local 134 under the terms of a union security clause agreed to by the company in the collective bargaining agreement.

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[14] We intimate no views concerning the reasonableness of the fines or expulsions. Such matters are not within the Board's jurisdiction under § 8(b)(1) but rather may be litigated in appropriate state court proceedings. *See generally NLRB* v. *Boeing Co.*, —— U.S. ——, 41 U.S. L. WEEK 4678 (May 21, 1973).

As recently as 1959, the collective bargaining agreements had prescribed monthly wage rates applicable to these foremen. Contracts since then have not contained such wage provisions, but the bargaining agreement in effect at the time of the instant dispute included a section entitled "Working Conditions for General Foremen and Foremen," which concerned payment for overtime work and for certain absences. Other provisions of the agreement, for example that dealing with vacations, were found by the trial examiner to be applicable to foremen as well as to rank-and-file employees.[15]

Other higher ranking supervisors were not part of the bargaining unit and were not represented by the union for collective bargaining purposes. None of their conditions of employment were determined by the bargaining agreement. These included employees in the positions of District Installation Superintendent, Plant Assignment Foreman, and Test Center Foreman. The company also permitted these higher ranking supervisors to maintain their union membership. In fact, in 1954, when the position of District Installation Superintendent was first created, the company and the union signed a Letter of Understanding, apparently still in force, providing that

> "[a]s District Installation Superintendents • • • their wages and conditions of employment will not be a matter of union-management negotiations but They [*sic*] will not be required to discontinue their membership in the union as it is recognized that they have accumulated a vested interest in pension and insurance benefits as a result of their membership in the union. • • •"

In contrast to *Florida Power*, we are here concerned with supervisors both in and out of the bargaining unit.

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[15] *Int. Brhd of Electrical Wkrs, supra* note 1, 192 NLRB No. 17 (trial examiner's decision at 3).

All supervisor-members received substantial benefits from union membership. Those in the bargaining unit benefitted in having the union act as their representative for collective bargaining purposes, including the benefit of any contract provisions obtained on their behalf by the union. Those both in and out of the bargaining unit benefitted from participation in the International's pension benefit and death benefit plans and from participation in group life insurance and old age benefit plans sponsored by Local 134. As in *Florida Power*, some supervisor-members apparently were no longer active dues-paying members but had obtained withdrawal cards. But, as indicated earlier, those on withdrawal cards continued to benefit under certain of the benefit plans.

The same International union is involved in both cases, and union members of Illinois Bell bore the same obligations under the International's constitution as were described earlier. In contrast to the *Florida Power* case, however, there was no provision in the Illinois Bell collective bargaining agreement in which the union purported to make any concessions with respect to union discipline of supervisor-members. The only related provision is in the 1954 Letter of Understanding which, after recognizing that those serving as District Installation Superintendents will be permitted to continue union membership, provides:

> "However, any allegiance they owe to the union shall not affect their judgment in the disposition of their supervisory duties. Since they will have under their supervision employees who are members of unions other than Local 134 and perhaps some with no union affiliations whatever, the company will expect the same impartial judgment that it demands from all Supervisory personnel."

Between May 8, 1968 and September 20, 1968, Local 134 engaged in an economic strike against the company. At the inception of the strike, the company informed supervisory personnel that it would like to have them come to

work during the work stoppage, but it told them the decision whether to work or to respect the strike was a matter left to the personal discretion of each individual. Indeed, the employer indicated that those who chose not to work would not be penalized. In contrast, Local 134 warned its supervisor-members, at a union meeting held immediately before the strike, that they would be subject to union discipline if they performed rank-and-file work during the strike. During the course of the strike, some of the supervisor-members crossed the union's picket line to perform rank-and-file struck work, while other supervisors honored the strike and stayed away from work. Local 134 carried out its pre-strike warning and brought disciplinary actions against a number of supervisors. Those who were found guilty of performing rank-and-file work during the strike were each fined $500. Unlike *Florida Power*, apparently no supervisors were expelled from the union or denied the right to continue participating in various union benefit plans. Local 134 has commenced suit in the Illinois courts to collect some of the fines, but insofar as any supervisors have paid any part of the fines the company has reimbursed them.

The Board found that in so disciplining supervisor-members the union violated Section 8(b)(1)(B) because "the underlying dispute giving rise to the fines was between the Union and Illinois Bell rather than between the Union and its supervisor-members." *Int. Brhd of Electrical Wkrs*, 192 NLRB No. 17 (slip opinion at 7) (1971). The Board referred to its decision in a case consolidated with *Illinois Bell* for purposes of oral argument before the Board in which it had said:

> "• • • The intent [of Section 8(b)(1)(B)] is to prevent the supervisor from being placed in a position where he must decide either to support his employer and thereby risk internal union discipline or support the union and thereby jeopardize his position with the employer. To place the supervisor in such a position casts doubt both upon his loyalty to his em-

ployer and upon his effectiveness as the employer's collective bargaining and grievance adjustment representative. The purpose of Section 8(b)(1)(B) is to assure to the employer that its selected collective-bargaining representatives will be completely faithful to its desires. This cannot be achieved if the union has an effective method, union disciplinary action, by which it can pressure such representatives to deviate from the interests of the employer. • • •"

Local Union No. 2150, Int. Brhd of Electrical Wkrs, 192 NLRB No. 16 (slip opinion at 7) (1971). Accordingly, the Board ordered the union to cease and desist, rescind all fines, expunge all records of disciplinary proceedings, and post appropriate notices.

I

Section 8(b)(1)(B) provides: "It shall be an unfair labor practice for a labor organization or its agents • • • to restrain or coerce • • • *an employer* in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances • • •." (Emphasis added.) The purpose of this provision is clear on its face. It is designed to prevent unions from restricting management's free choice of its agent to bargain with the union or adjust grievances. Under the Act, each party to the collective bargaining process has a right to choose its representative, and there is a correlative duty on the opposite party to negotiate with the appointed agent. *See NLRB* v. *Int. Ladies' Garment Wkrs Union,* 3 Cir., 274 F.2d 376 (1960).

The legislative history of the section is fully consistent with this literal reading. The Senate Report says that the section

> "proscribes unions and their agents from interfering with, restraining, or coercing employers in the selection of their representatives for the purposes of col-

lective bargaining or the settlement of grievances. • • • [T]his subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances."

1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT (hereinafter "Legis. Hist.") 427 (1948). Senator Taft gave an appropriate example of the kind of activity the section was designed to proscribe:

> "This unfair labor practice referred to is not perhaps of tremendous importance, but employees cannot say to their employer, 'We do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y.' That has been done. It would prevent their saying to the employer, 'You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you have to fire him, or we will not go to work.' • • •"

2 Legis. Hist. 1012. Senator Ellender echoed the same concerns:

> "• • • [Q]uite a few unions forced employers to change foremen. They have been taking it upon themselves to say that management should not appoint any representative who is too strict with the membership of the union. This amendment seeks to prescribe a remedy in order to prevent such interferences."

Another concern expressed in the legislative history involves unions forcing management to bargain through a multi-employer association.

> "• • • [A] union or its responsible agents could not, without violating the law, coerce an employer into joining or resigning from an employer association which negotiates labor contracts on behalf of its members • • •."

1 Legis. Hist. 427.

> "• • • Under this provision it would be impossible for a union to say to a company, 'We will not bargain with you unless you appoint your national employers' association as your agent so that we can bargain nationally.' Under the bill the employer has a right to say, 'No, I will not join in national bargaining. Here is my representative, and this is the man you have to deal with.' • • •"

2 Legis. Hist. 1012 (remarks of Senator Taft).

For over 20 years since its enactment in 1947, Section 8(b)(1)(B) interpretations by the Board faithfully followed its literal language and this legislative history. The cases decided by the Board involved attempts either to force employers into or out of multi-employer association, *see, e.g., United State, Tile, etc. Wkrs Assn, Local 36 (Roofing Contractors Assn of Southern California)*, 172 NLRB No. 249 (1968); *Orange Belt District Council of Painters No. 48 (Painting & Decorating Contractors of America, Inc.)*, 152 NLRB 1136 (1965), or to force dismissal of an employer bargaining representative or grievance adjuster considered objectionable because of his tough, anti-union attitude, *see, e.g., Local 986, Teamsters Union (Tak-Trak, Inc.)*, 145 NLRB 1511 (1964); *Los Angeles Cloak Joint Board, ILGWU (Helen Rose Co.)*, 127 NLRB 1543 (1960). *See also NLRB* v. *Local 294, Int. Brhd of Teamsters*, 2 Cir., 284 F.2d 893 (1960).

That the present cases lie outside this original understanding of Section 8(b)(1)(B) seems obvious. There was no claim or showing in either case that the purpose of disciplining the supervisors was to get management to replace them. There is no indication that replacement of the fined supervisors was even a likely result of the union discipline. Indeed, just the opposite seems the case. In *Illinois Bell*, at the inception of the strike management expressly told all supervisors that no reprisals would be taken against those observing the picket line, and after

the strike management promoted many of those who chose not to cross the picket line to perform rank-and-file work. Nor is there any indication in *Florida Power* that the company replaced any striking supervisors. The only purpose and likely effect of the imposition of union discipline was to force the supervisors to observe the picket line to the extent of not performing struck work for the employer. If anyone was restrained or coerced, it was the supervisors, not their employer.

Since 1968, however, the Board has embarked upon a new approach in applying Section 8(b)(1)(B), expanding its scope far beyond the situations encompassed in this original understanding. The process began with the Board's decision in *San Francisco-Oakland Mailers' Union No. 18*, 172 NLRB No. 252 (1968). In *Oakland Mailers*, management charged the union with attempting to discipline a foreman for the manner in which he interpreted the collective bargaining contract in making work assignments for the employees under his supervision. Although there was no allegation that the union was attempting to coerce the employer into hiring a new representative for collective bargaining and adjustment of grievances, the Board nonetheless found a Section 8(b)(1)(B) violation. The union's actions, according to the Board, "were designed to change the [company's] representatives from persons representing the viewpoint of management to persons responsive or subservient to [the union's] will." Slip opinion at 2. This was the sort of pressure which Section 8(b)(1)(B) was designed to prevent. "That [the union] may have sought the substitution of attitudes rather than persons, and may have exerted its pressure upon the [company] by indirect rather than direct means, cannot alter the ultimate fact that pressure was exerted here for the purpose of interfering with the [company's] control over its representatives. Realistically, the [company] would have to replace its foremen or face *de facto* nonrepresentation by them." *Id.* at 3.

Although the *Oakland Mailers* doctrine unquestionably expanded Section 8(b)(1)(B) to cover situations not envisioned by the section's enactors, we have recognized and continue to recognize that its basic rationale is consistent with the purposes of Section 8(b)(1)(B). *See Dallas Mailers Union, Local No. 143* v. *NLRB*, 144 U.S.App.D.C. 254, 445 F.2d 730 (1971). Where a supervisor is disciplined for the manner in which he performed his collective bargaining and grievance adjustment functions, the union's purpose in imposing such discipline and the discipline's likely effect is to change the manner in which the supervisor performs those functions in the future. Discipline therefore achieves by indirect means what Section 8(b)(1)(B) clearly was intended to prevent. It permits the union to get a supervisor who is not "too strict with the membership of the union," *see* page 14 *supra*, not by changing the identity of the supervisor, but by changing the attitude the supervisor brings to his grievance adjustment and collective bargaining tasks. Although Section 8(b)(1)(B) speaks literally in terms of coercing the "selection" of employer representatives, it is clear that management's right to a free selection would be hollow indeed if the union could dictate the manner in which the selected representative performed his collective bargaining and grievance adjustment duties.

In several cases decided after *Oakland Mailers*, the Board continued to apply Section 8(b)(1)(B) to union attempts to discipline supervisors for the manner in which they performed their collective bargaining or grievance adjustment functions. In some of these cases fines had been imposed "for the manner in which the [foreman] had interpreted and administered" the collective bargaining agreement, *Toledo Locals Nos. 15-P & 272. Lithographers & Photoengravers Int. Union (Toledo Blade Co.)*, 175 NLRB 1072 (1969), *enforced*, 6 Cir., 437 F.2d 55 (1971), or where the union had "sought, by an internal union procedure, to enforce its viewpoint as to the meaning of the contract," *Sheet Metal Wkrs Int. Assn, Local Union 49*

(General Metal Products, Inc.), 178 NLRB 139, 142 (1969), *enforced*, 10 Cir., 430 F.2d 1348 (1970). *See also Houston Typographical Union No. 87*, 182 NLRB 592 (1970);[16] *Freight, Constr., Gen. Drivers, Warehousemen & Helpers Union (Grinnell Co. of the Pacific)*, 183 NLRB No. 49 (1970);[17] *New Mexico District Council of Carpenters & Joiners (A. S. Horner, Inc.)*, 176 NLRB 797 (1969), *enforced*, 10 Cir., 454 F.2d 1116 (1972).[18] In another case a foreman was fined for being too strict with one of the employees under his supervision, and the record clearly indicated that the union desired to have the foreman replaced. *See Dallas Mailers Union, Local No. 143* v. *NLRB*, *supra*, *enforcing* 181 NLRB 286 (1970).

A common theme emerges from these cases which at once defines the scope of the *Oakland Mailers* doctrine and relates that doctrine to the core concerns of Section 8(b)(1)(B). In each, "[t]he relationship between the Union and its members • • • [was] used as a convenient and, it would seem, powerful tool • • • to compel the Employer's foremen to take pro-union positions in interpreting the collective bargaining agreement." *San Francisco-Oakland*

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[16] "[T]he instant case involves discipline of a supervisor-member • • • for violation of the contract • • •." 182 NLRB at 595 (trial examiner's decision).

[17] Here the underlying contract dispute between the union and the supervisor-member was whether certain work fell within the supervisor's job classification under the contract or within other employees' job classifications. 183 NLRB No. 49 (trial examiner's decision at 4 & 9).

[18] In this case the union disciplined a supervisor-member who co-signed a letter urging employees to vote with management in an upcoming election. Obviously, it is part of a supervisor's collective bargaining duties to urge management's viewpoint on union members. The union thus disciplined the supervisor for the effective performance of his collective bargaining function, bringing the case squarely within the *Oakland Mailers* rationale.

Mailers' Union No. 18, supra, 172 NLRB No. 252 (slip opinion at 4).[19]

Only one previously decided § 8(b)(1)(B) opinion cannot be squared with this rationale, but it is explainable on other grounds. In *New Mexico District Council of Carpenters & Joiners of America (A. S. Horner, Inc.)*, 177 NLRB 500 (1969), *enforced*, 10 Cir., 454 F.2d 1116 (1972), a union member was fined for working as a supervisor for a company which had no contract with the union. In these circumstances, however, compliance by the supervisor with the union's demands would have meant quitting his job with the employer, thereby having "the effect of depriving the Company of the services of its selected representative for the purposes of collective bargaining or the adjustment of grievances." 177 NLRB at 502. The case thus falls close to the original rationale of § 8(b)(1)(B) which was to permit the employer to keep the bargaining representative of his own choosing. *See* text at pp. 14-15, *supra*. *See also Local Union No. 453, supra,* 183 NLRB No. 24 (trial examiner's decision at 4).

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[19] "There have been several cases dealing with the question whether the imposition by a union of a fine on an employer representative authorized to adjust grievances violates Section 8(b)(1)(B). In all these cases the Board found a violation. However, • • • they involved fines imposed on a supervisor because of his alleged violation of a collective bargaining contract, and the Board's rationale in those cases • • • was that the respondent union's action was designed to compel the supervisor 'to take pro-union positions in interpreting the collective-bargaining agreement.' It is apparent from this that the Board was influenced in those cases by the fact that the supervisor was disciplined for an alleged misinterpretation or misapplication of the contract, and that the natural and foreseeable effect of such discipline was that, in resolving future grievances over alleged contract violations, the supervisor would be reluctant to take a position adverse to that of the union • • • • • • "

Local Union No. 453, Brhd of Painters, etc. (Syd Gough & Sons, Inc.), 183 NLRB No. 24 (1970) (trial examiner's decision at 3) (footnotes omitted).

The cases before us, however, are critically different from those decided under *Oakland Mailers* and lie outside the rationale of that case and its progeny. In both cases here the union has disciplined supervisors, not for the way they interpreted the collective bargaining agreement, not for being too strict with union members, but simply for crossing a picket line to perform rank-and-file struck work. There is no underlying dispute relating to contract interpretation or grievance settlement in these cases, but rather an economic clash between union and employer totally unrelated to the manner in which supervisors perform their collective bargaining or grievance settlement functions. As the trial examiner in *Illinois Bell* pointed out, the previous cases are all

> "readily distinguishable here where the action for which the supervisors were fined bore no direct relation to their work as supervisors or to any interpretation of the contract. As an original proposition I would be inclined to construe Section 8(b)(1)(B) as interdicting union fines of supervisors only when the conduct for which the supervisor was fined bore some relation to his role as a representative of management in 'collective bargaining or the adjustment of grievances,' to quote Section 8(b)(1)(B). In the instant case the question confronting the supervisors whether to work or to respect the strike call of their Union was in no way related to those subjects. Moreover, the Company itself had made it clear that it was not demanding that its supervisors work during the strike. On the contrary, the Company expressly left the decision up to each individual supervisor, with specific assurances that no reprisal would be visited on those who chose not to work. After the strike the Company promoted some of the supervisors who had not worked during the strike. I therefore find some difficulty in concluding that the Company was restrained or coerced by the Union's action in finding the supervisors who worked, or even in finding that

> the Union's action had any natural or inherent tendency to restrain or coerce the Company. • • •"

192 NLRB No. 17 (trial examiner's decision at 9) And as Member Fanning pointed out in dissent:

> "Here the supervisors were not fined because they gave directions to the work force, interpreted the collective-bargaining agreement, adjusted grievances, or performed any other function generally related to supervisory activities, in a manner in disfavor with the Respondent Union. They were fined because they performed production work in the bargaining unit during a strike. Their Employer sought to use them, not in the direction of the work of employees who had not gone on strike or of replacements for strikers, but to replace the strikers themselves. In short, he assigned them to work as employees within the meaning of Section 2(3) of the Act, not as supervisors within the meaning of Section 2(11) of the Act. • • •"

192 NLRB No. 17 (slip opinion at 13).

The Board insists, however, that the present cases fall within the *Oakland Mailers* rationale. Its position is couched in vague but superficially appealing language. It is said that these fines "impinged on the loyalty" which the employer should be able to expect from his supervisors, *id.* at 6, that if they were found to be lawful they would permit the union "to drive a wedge between a supervisor and the Employer," *Local Union No. 2150, Int. Brhd of Electrical Wkrs, supra,* 192 NLRB No. 16 (slip opinion at 6), and that as a result an employer "could no longer count on the complete and undivided loyalty of those it had selected to act as its collective-bargaining agents or to act for it in adjusting grievances." *Id.* at 6-7. If we try to rephrase the Board's language in terms consistent with the rationale of *Oakland Mailers,* the Board's position seems to come down to the following propositions. By being forced to take sides with the union during any confrontation between union and employer, even one unre-

lated to performance of his collective bargaining or grievance adjustment functions, a supervisor becomes, or is likely to become, more loyal to the union and less loyal to the company. He is then likely to bring this shift in loyalities to his grievance adjustment or collective bargaining tasks in the future, thus achieving in the end precisely that which Section 8(b)(1)(B) and the *Oakland Mailers* doctrine were intended to prevent. In our view, the Board overestimates the risk that discipline for performing rank-and-file struck work will significantly affect performance of grievance adjustment and collective bargaining functions.

Discipline, or the threat thereof, may well force a supervisor to observe a picket line, but it is questionable whether it will turn him into a believer in the union's cause. The Illinois Bell Company apparently recognized as much when it promoted many of those supervisors who, under threat of union discipline, refused to cross the picket line to perform rank-and-file struck work. Our everyday experience tells us that the result of discipline is normally some degree of hostility toward the perrson or group imposing the discipline, and this commonsense analysis appears confirmed by the record in the cases before us. The result of threatened union discipline was to turn the supervisors against the union, not to ingratiate them into the union fold. This is even clearer when we look at expulsion as a disciplinary measure. Those who are expelled are obviously going to be more loyal to the company and less loyal to the union in the future. One who has resigned or been expelled from union membership owes no further obligations to the union. *See NLRB* v. *Granite State Joint Board, Textile Wkrs Union of America, Local 1029*, 409 U.S. 213 (1972). Therefore, not only is there no reason to conclude that those supervisors of Florida Power who were expelled from the union will be more lenient with the union when they are called upon to interpret the contract, adjust grievances, or engage in collective bargaining in the future. Just the opposite is likely to be the case.

More importantly, let us concede for the moment that in some manner, perhaps through the camaraderie of the picket line, a supervisor who is forced under threat of discipline to observe a picket line undergoes a subtle change in attitude and comes to feel closer ties to the union. It still does not follow that this change in attitude will affect his performance of his collective bargaining or grievance adjustment functions. When a supervisor acts as such he is a representative of management, and as such he should be immune from union discipline. The unions participating in the present cases conceded as much as oral argument when they agreed that when a supervisor crosses a picket line to perform *supervisory* work he remains immune from discipline. But when a supervisor foresakes his supervisory role to do rank-and-file work ordinarily the domain of nonsupervisory employees, he is no longer acting as a management representative and no longer merits any immunity from discipline. The dividing line between supervisory and nonsupervisor work in the present context is sharply defined and easily understood. There is accordingly no reason to believe that by being forced to take sides with the union in a dispute unrelated to the performance of his supervisory functions, and to take sides only to the extent of withholding his labor from rank-and-file nonsupervisory work, a supervisor will suffer from a change in attitude when, after the strike, he returns to the performance of his normal supervisory duties. Despite the Board's protestations to the contrary, he is not put in the difficult position of serving the union and the employer at the same time. As the Board has noted in an analogous situation where supervisory and rank-and-file functions were "sharply demarcated," the supervisors "will not be 'serving two masters at the same time.' They will be serving them at different times." *See Great Western Sugar Co.*, 137 NLRB 551, 553-554 (1962).

The foregoing analysis should serve to dispel any support the Board might have hoped to obtain from our recent decision in *Meat Cutters Union Local 81* v. *NLRB*,

147 U.S.App.D.C. 375, 458 F.2d 794 (1972.) In its decision in this case, *Meat Cutters Union Local 81*, 185 NLRB No. 130 (1970), the Board found a Section 8(b)(1)(B) violation when a union attempted to discipline a supervisory employee for obeying a company order to institute a new meat procurement policy which would have resulted in a loss of union jobs. *Meat Cutters* differed from *Oakland Mailers* in that no one claimed that the new procurement policy had anything to do with the supervisor's grievance settlement or collective bargaining functions. It was thus unclear how the Board could claim that any substitution of attitudes or shift in loyalties in violation of Section 8(b)(1)(B) as to these functions had occurred, particularly in view of its recent explicit rejection of a *per se* ban on all union discipline of supervisory employees. *See Local Union 453 Brhd of Painters, etc. (Syd Gough & Sons, Inc.)*, 183 NLRB No. 24 (1970).

When *Meat Cutters* was appealed to this court, we were clearly concerned that the Board's Section 8(b)(1)(B) decisions might be deteriorating into a flat prohibition against any union discipline of supervisors. Our objections to such a prohibition are explained in greater detail in Part III of this opinion, but suffice it for now to state that such an approach inequitably gives supervisory personnel all the benefits of union membership without having to bear any of the responsibilities. In its brief in *Meat Cutters*, however, the Board sought to meet these fears and dispel them. "[I]t is only when the representative's obligations to the union conflict with his management responsibilities that his union obligations are compelled to yield," the Board argued. "Thus, in each case, including the instant case, where the Board has found a Section 8(b)(1)(B) violation based on union discipline of a management representative, the conduct which prompted disciplinary action consisted of the representative's efforts to discharge his management responsibilities. • • • In fact, the Board has recently dismissed a Section 8(b)(1)(B) complaint on the ground that the infraction of union rules

for which the employer representative was disciplined did not involve the exercise of supervisory or managerial authority." NLRB brief at 15 in *Meat Cutters Union Local 81* v. *NLRB, supra.*

Partially on the basis of these representations we enforced the Board's decision, but with the explicit caveat that "[t]he rule here applied by the Board only affects union discipline which is imposed upon a member, who has responsibilities as a representative of his employer in administering the collective bargaining agreement or the adjustment of employee grievances, because he has performed duties as a management representative. • • • The N.L.R.B. has made it clear that a union may legally discipline a supervisory-member for acts which are *not* performed by the individual in furtherance of his obligations as the employer's representative." *Meat Cutters Union Local 81* v. *NLRB, supra,* 147 U.S.App.D.C. at 379-380 n.12, 458 F.2d at 798-799 n.12 (Emphasis in original.)

Perhaps it is unfair to suggest that the Board is dissembling in seeking to draw some support for its present position from *Meat Cutters,* but certainly it is clear that the Board is changing its interpretation of the law to suit the case. *Meat Cutters* was an expansion of the *Oakland Mailers* doctrine, but it nevertheless was and remains directly tied to the principles *Oakland Mailers* properly implied from Section 8(b)(1)(B). The discipline of the supervisor in *Meat Cutters* was not totally unrelated to the performance of grievance settlement functions since by fining the supervisor the union was avoiding and undercutting a clause in the contract that provided that all matters pertaining to the proper application of the agreement shall be handled by certan grievance-arbitration procedures spelled out in the agreement. *See* 147 U.S.App.D.C. at 378 n.6, 458 F.2d at 797 n.6. More importantly, the underlying dispute was one of contract interpretations since the union's basic position was that the new meat procurement policy which the supervisor was fined for enforcing violated the collec-

tive bargaining agreement. *See* 147 U.S.App.D.C. at 378, 458 F.2d at 797. Discipline was used, in effect, as a tool to enforce the union's interpretation of the collective bargaining agreement. *See* page 18 *supra*. In the present cases, by contrast, no question of grievance settlement or contract interpretation is either directly or indirectly involved. The underlying dispute is not one of contract interpretation, but simply a lawful economic strike against the company to get a better contract.

The Board, in a final attempt to bring this case within the holding of *Meat Cutters*, argues that crossing the picket line to perform rank-and-file work is part of a supervisor's management function. The Board claims that management "considered its supervisors among those it could depend on" during a strike, and that the employer "had a right to expect the supervisor" to cross the picket line and perform rank-and-file struck work. *Local Union No. 2150, Int. Brhd of Electrical Wkrs, supra*, 192 NLRB No. 16 (slip opinion at 6). But saying that rank-and-file labor is part of a management function is tantamount to saying that black is white. Whatever the parameters of *Meat Cutters'* "management function" test may be, the term "management function" has no meaning except in contrast to the concept of rank-and-file work. And the Board's reference to management's "right" to expect supervisors to perform rank-and-file work is nothing but a facade by which the Board hopes to avoid analysis by assuming the answer to the question before it.

Try as one might, then, there is simply no way to derive the Board's decision in these cases from the literal language of Section 8(b)(1)(B), from the legislative history, or from the gloss that has been added to that section by *Oakland Mailers* and subsequent cases. The Board's decision in these cases, in the words of the learned trial examiner in *Illinois Bell*, "stretch[es] the statute beyond what I would otherwise consider the breaking point." *Int. Brhd of Electrical Wkrs*, 192 NLRB No. 17 (trial examiner's decision at 11) (1971).

In the final analysis, the Board's position in these cases does not rest on the language of Section 8(b)(1)(B), *Oakland Mailers, or Meat Cutters,* but rather on a policy which the Board for the first time now finds imbedded in Section 8(b)(1)(B)—that supervisors who are permitted by their employer to join unions owe their undivided loyalty to their employer in any dispute between the union and the employer. That the Board has just discovered this policy some 20-odd years after enactment of Section 8(b)(1)(B) makes us naturally suspicious that any such policy exists, especially since it appears that union discipline of supervisors is a long-standing problem that labor and management have attempted to resolve in a collective bargaining context for many years.[20] The Board apparently derives this intepretation of the statute in large part from Sections 2(3) and 14(a) of the Act which, as noted earlier, deprive supervisors of the protections of the Act and give employers the right to refuse to hire union members as supervisors. The Board's analysis starts off correctly enough when it states that in enacting these sections Congress recognized that an employer should be able to keep his supervisors out of unions in order to ensure their undivided loyalty. But the Board is mistaken in leaping to the conclusion that this same objective should be furthered by interpreting Section 8(b)(1)(B) to preclude all union discipline of supervisor members when the employer has permitted his supervisors to maintain union membership.

We draw precisely the opposite conclusion from the interelationship between Sections 2(3) and 14(a), on the one hand, and Section 8(b)(1)(B) on the other. When Congress recognized that an employer should be able to have supervisors who owe him their individual loyalty, it gave the employer a specific means to achieve such loyalty—the right to refuse to hire union members as supervisors, or in other words, the right to require employees to relinquish union membership upon promotion to a super-

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[20] *See* text at pp. 34-40 *infra.*

visory position. Congress never intended the inequitable result of permitting supervisors to have it both ways—joining unions with the consent of their employer and obtaining all the advantages of union membership without assuming the basic obligations normally incident to such membership.

The policy questions raised in an analysis of the statutes are relevant not only in this context, but also in order to apply the principles set down in a line of Supreme Court cases concerning union discipline of members. Since, in our view, those cases control the ones before us, we now turn to consider the Supreme Court precedents and return in Part III to a discussion of the interelationship between Section 8(b)(1)(B) and the exclusion of supervisors from the protections of the Act in Sections 2(3) and 14(a).

II

The Board's rough sailing through the complexities of Section 8(b)(1)(B) might, perhaps, be more understandable if the areas were entirely uncharted. But in fact union discipline of members who cross picket lines to do struck work has been the subject of a series of important Supreme Court decisions. The Board has considered these decisions in its past applications of Section 8(b)(1)(B), but inexplicably chose to ignore them in its decision in the present cases. The Supreme Court's decisions, unlike the Board's approach, set out a rational, workable interpretation of Section 8(b)(1) which balances a union's right to enforce reasonable discipline against the rights of employers and union members to be free from union overreaching.

The first and most important of these decisions is *NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967). In all relevant respects, *Allis-Chalmers* is indistinguishable from these cases. There, as here, the union sought to impose reasonable fines on union members who had crossed a picket line during a lawful strike. In *Allis-Chalmers*,

however, none of the fined members were supervisors, so the relevant provision governing the union's conduct was subsection (A) of Section 8(b)(1) rather than subsection (B). However, when the Supreme Court found the union innocent of any unfair labor practice, it did so not because of anything peculiar to subsection (A), but rather because of its interpretation of the words "restrain or coerce" which are common to subsections (A) and (B). *See* Christensen, *Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Democracy*, 43 N.Y.U. L. Rev. 227, 268 (1968). Thus the Court stated: "It is highly unrealistic to regard § 8(b)(1), *and particularly its words 'restrain or coerce,'* as precisely and unambiguously covering the union conduct involved in this case." 338 U.S. at 179. (Emphasis added.) On the contrary, such a reading of Section 8(b)(1) would "attribute to Congress an intent at war with the understanding of the union-membership relation which has been at the heart of its effort "to fashion a coherent labor policy' and which has been a predicate underlying action by this Court and the state courts. More importantly, it is to say that Congress limited unions in the powers necessary to the discharge of their role as exclusive statutory bargaining agents by impairing the usefulness of labor's cherished strike weapon." *Id.* at 183.

Of course, *Allis-Chalmers* did not mean that unions were free to impose discipline for any purpose at all. Section 8(b)(1) must be read so as to conform with the other provisions of federal labor law. *See, e.g. NLRB* v. *Int. Ladies Garment Wkrs Union, supra*, 274 F.2d 376; Silard, *Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers and Scofield*, 38 Geo. Wash. L. Rev. 187, 193-196 (1969). Thus if a union rule "invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating § 8(b)(1)." *Scofield* v. *NLRB*, 394 U.S. 423, 429 (1969). *See NLRB* v. *Industrial Union of Marine & Shipbuilding Wkrs*, 391 U.S. 418 (1968). But if one thing is clear after *Allis-Chalmers*, it is that there is no "overrid-

ing policy of the labor laws" which prohibits reasonable union fines levied against members who cross a lawful picket line to perform rank-and-file struck work. In fact, quite the contrary is true.

> "Integral to [the] federal labor policy has been the power in the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and '[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent. . . .'" • • •"

NLRB v. *Allis-Chalmers Manufacturing Co., supra,* 388 U.S. at 181. (Footnotes omitted.)

The Board attempted in its *Oakland Mailers* decision to distinguish *Allis-Chalmers* from cases arising under Section 8(b)(1)(B).

> "• • • The Supreme Court, in finding lawful the union action involved in *Allis Chalmers,* relied in part on the proviso to Section 8(b)(1)(A), providing that the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership shall not be impaired. However, that proviso is limited to Section 8(b)(1)(A) of the Act only and is not a part of Section 8(b)(1)(B). • • •"

San Francisco-Oakland Mailers' Union No. 18, supra, 172 NLRB No. 252 (slip opinion at 3-4). It is quite clear, however, that the Board has misread the *Allis-Chalmers* decision. The Court expressly stated in its opinion that it was unnecessary to decide whether the proviso protected the union discipline there under scrutiny. *See NLRB* v. *Allis-Chalmers Manufacturing Co., supra,* 388 U.S. at 192 n.29. And as Mr. Justice Black pointed out in dissent: "[T]he

Court correctly assumes that the proviso to § 8(b)(1)(A) cannot be read to authorize its holding." *Id.* at 200. Indeed, our own court just recently characterized the holding in *Allis-Chalmers* as follows:

> "• • • Instead of relying on the express language of the *proviso*, • • • the Supreme Court carefully analyzed the entire legislative history of Section 8(b)(1)(A), and it concluded that Congress did not intend to prohibit such internal union discipline by the prohibition against 'restraint' or 'coercion.' • • •"

Booster Lodge No. 405, Int. Assn of Machinists, etc. v. *NLRB, supra*, 148 U.S.App.D.C. at 125, 459 F.2d at 1149.

That the proviso is appended to Section 8(b)(1)(A) rather than to both that section and Section 8(b)(1)(B) is without significance in these cases. As we saw earlier, under the original congressional understanding Section 8(b)(1)(B) did not affect union discipline of supervisors, but only concerned direct attempts to restrain or coerce employers. So understood, it was unnecessary to repeat the proviso in Section 8(b)(1)(B). Now that *Oakland Mailers* has expanded Section 8(b)(1)(B) to encompass indirect coercion of employers through discipline of supervisors, the proviso gains significance for both subsections of Section 8(b)(1), for as the Supreme Court noted in *Allis-Chalmers*, the proviso was only party of "the repeated refrain throughout the debates on § 8(b)(1)(A) *and other sections* that Congress did not propose any limitations with respect to the internal affairs of unions • • •." 388 U.S. at 195. (Emphasis added.)

Apparently having sensed that its proviso distinction will not withstand analysis, the Board now puts forth a new argument. *Allis-Chalmers*, according to the Board, dealt only with internal union rules affecting the relationship between a member and the labor organization to which he belongs. Here, however, the Board claims, the union discipline does not concern legitimate internal union affairs,

but affects primarily the employer who is external to the union-member relationship.[21]

The Board's internal-external distinction, however, simply cannot be squared with the holding in *Allis-Chalmers*. Of course, the discipline in *Allis-Chalmers* had, and was intended to have, an external effect on the employer. By deterring strikebreakers the rule assured union solidarity and thereby allowed the union to bring greater economic pressure on the company. The discipline has precisely the same "external" effect in the present cases. If the anti-strikebreaking activity there can be characterized as "internal" it simply makes no sense to label the same sort of anti-strikebreaking rule in these cases as "external." The Board recognized as much in its *Oakland Mailers* decision:

"[O]nly legitimate internal union affairs are protected under *Allis-Chalmers*. The *Allis-Chalmers* case involved a union's fining of its members for crossing picket lines. The primary relationship there affected was the one between the union and its members, and the union's particular objective—solidarity in strike action—was deemed by the Supreme Court a legitimate area for union concern in the circumstances involved." *San Francisco-Oakland Mailers'*

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[21] The Board argues that the union has only a peripheral interest in fining the supervisors because supervisors make up such a small percentage of the total work force. In each case, the Board argues, the union fined less than 60 supervisors, while approximately 12,000 other employees in *Illinois Bell* and approximately 5,000 other employees in *Florida Power* remained, in the Board's words, "available for strike action." It is obvious, however, that the union had a definite and substantial interest in preventing even a small number of supervisors from performing rank-and-file struck work, since in the highly automated public utility industries involved in these cases a small work force composed of strikebreakers and non-union management personnel can evidently provide sufficient manpower to continue vital services in a strike, thereby cutting into the strike's effectiveness.

Union No. 18, supra, 172 NLRB No. 252 (slip opinion at 4). (Footnote omitted.)

It is true that *Allis-Chalmers* concerns only so-called "internal" union discipline in the sense that the term "internal" refers to the manner in which the union enforces its rule, not to the identity of the parties affected by the rule. Union discipline is internal when it is enforced through fines or expulsion from the union. It becomes "external," and a violation of Section 8(b)(1)(A) as well as other sections of the Act, when the union seeks to have the employer fire or take other measures against the recalcitrant union member.[11] The Supreme Court made this clear in its decision in *Scofield* v. *NLRB, supra,* its next major Section 8(b)(1) case after *Allis-Chalmers.* Describing its analysis in *Allis-Chalmers,* the *Scofield* Court stated:

> "• • • The Court thus essentially accepted the position of the National Labor Relations Board dating from *Minneapolis Star & Tribune Co.,* 109 N.L.R.B. 727 (1954) where the Board also distinguished internal from external enforcement in holding that a union could fine a member for his failure to take part in picketing during a strike but that the same rule could not be enforced by causing the employer to exclude him from the work force or by affecting his seniority • • • • • • •"

394 U.S. at 428. (Footnote omitted.) *See also NLRB* v. *Allis-Chalmers Manufacturing Co., supra,* 388 U.S. at 185; *Local 283, United Auto., Aircraft & Agric. Imp. Wkrs (Wisconsin Motor Corp.),* 145 NLRB 1097, 1104 (1964), *affirmed, sub nom. Scofield* v. *NLRB, supra.* The internal-external distinction thus has nothing to do with who is

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[11] "[Sections 8(b)(1), 8(b)(2), 8(a)(1), 8(a)(2), and 8(a)(3)] • • • form a web, of which § 8(b)(1)(A) is only a strand, preventing the union from inducing the employer to use the emoluments of the job to enforce the union's rules." *Scofield* v. *NLRB,* 394 U.S. 423, 428-429 (1969).

affected by the union discipline. As the Court recognized in *Scofield*, union discipline normally affects all three participants in the union-management relation: employer, employee, and union. *Scofield* v. *NLRB*, *supra*, 394 U.S. at 431. But it does not follow from this that enforcement of the rule violates the Act "unless some impairment of a statutory labor policy can be shown." *Id.* at 432.

The Board's last attempt to distinguish *Allis-Chalmers* relates to the matter of statutory labor policy. Subsequent to *Allis-Chalmers*, the Court made it clear that even internal enforcement of union rules violates Section 8(b)(1)(A) if such enforcement "invades or frustrates an overriding policy of the labor laws," *Scofield* v. *NLRB*, *supra*, 394 U.S. at 429, or if it contravenes "other considerations of public policy . . ." *NLRB* v. *Industrial Union of Marine & Shipbuilding Wkrs*, *supra*, 391 U.S. at 424. The Board argues, as we indicated at the close of Part I of this opinion, that the legislative history of Sections 2(3) and 14(a) of the Act indicates an overriding congressional policy in favor of supervisors who are completely subservient to their employer's will. As indicated earlier, we disagree with the Board's analysis of the interrelationship between Section 8(b)(1)(B) on the one hand and Sections 2(3) and 14(a) on the other, and it is to this issue that we now turn.

III

Although it is only since 1968 that the Board has sought to use Section 8(b)(1)(B) as a solution to conflict of loyalties problems arising from union discipline of supervisor-members, these problems are not of recent vintage.[11] Prior to passage of the National Labor Relations Act in 1935, it was quite common for foremen in many industries to become unionized in the same bargaining unit as their subordinates. *See Jones & Laughlin Steel Corp.*, 66 NLRB

[11] *See, e.g., Local Union No. 57* v. *Boyd*, 245 Ala. 227, 16 So.2d 705 (1944), where a union fined a supervisor-member for firing another union member for loafing on the job.

386, 400 (1946). Conflict of loyalties problems were common, and employers were concerned "lest foremen should be subject to union discipline for differing with the local union in the interpretation of the terms of a contract." *Id.* at 401 n.27, *quoting* H. MILLIS (ed.), How COLLECTIVE BARGAINING WORKS 67 (1942). Such problems as arose were apparently worked out through collective bargaining. Unions recognized the legitimate concerns of employers in having contracts fairly administered by foremen, and means were provided for resolving disputes. "The unions [did] not, however, forego their right to discipline foremen for disobeying laws relating to internal union matters, or for deliberately disregarding union rules." *Ibid.*

The problem of supervisor-member conflict of loyalties first came before the Board under the 1935 Act in the form of the question whether foremen and other supervisors were "employees" under the statute, that is, whether management was required to engage in collective bargaining with foremen. The Board first held that foremen were "employees" and entitled to the protections of the Act, *see Union Collieries Coal Co.*, 41 NLRB 961 (1942), but abruptly shifted course a year later in *Maryland Drydock Co.*, 49 NLRB 733 (1943). The Board justified its shift on fears that conflicts of loyalties would arise if foremen belonged to the same union as the men under their supervision.

> "The very nature of a foreman's duties make him an instrumentality of management in dealing with labor. The duty of supervision with which he is principally charged implies a delegation of authority with respect to the selection, promotion, and discharge of the workers in his section. • • • To hold that the National Labor Relations Act contemplated the representation of supervisory employees by the same organizations which might represent the subordinates would be to view the statute as repudiating the historic prohibition of the common law against fiduciaries serving conflicting interestts."

Id. at 740. (Footnote omitted.) The Board, however, soon shifted positions again, holding that foremen were entitled to mandatory collective bargaining under the Act if they formed unions independent of those representing the rank and file. *See Packard Motor Car. Co.*, 61 NLRB 4 (1945), *enforced*, 6 Cir., 157 F.2d 80 (1946), *affirmed*, 330 U.S. 485 (1947). And the next year, in *Jones & Laughlin Steel Corp.*, *supra*, the Board held that supervisors were entitled to the protections of the Act even if they were represented by the same union that represented the rank and file.

The Board's opinion in *Jones & Laughlin Steel Corp.* is helpful in understanding the significance of the 1947 amendments to Sections 2(3) and 14(a) of the Act. To begin with, the Board recognized the conflict of loyalties problems arising from having supervisors belong to the same union that represents the rank and file. The Board noted the "serious and genuine concern about the effect of this decision upon the relations of management with its foremen, and the effect of the unionization of the latter upon their loyalty to the employer's interests." 66 NLRB at 402. But the Board concluded that "satisfactory solutions" to these problems "can be worked out by men of good will on both sides in the give-and-take of collective bargaining." *Id.* at 401. "[T]he union and the employer, neither of which is lacking in ingenuity, should not be discouraged by this Board from working out, at the bargaining table, contract clauses which will deal with this difficult situation. Such clauses can guarantee the maintenance of discipline by supervisors without fear of reprisal by the rank-and-file * * *." *Id.* at 402-403.

The question whether foremen and other supervisory employees were entitled as a class to the rights of self-organization, collective bargaining, and other concerted activities assured to employees by the 1935 National Labor Relations Act came before the Supreme Court in *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485 (1947). The Court had before it the arguments "that unionization of foremen is from many points bad industrial policy, that it puts the union foreman

in the position of serving two masters, divides his loyalty and makes generally for bad relations between management and labor." *Id.* at 493. But the Court found policy to be irrelevant to its decision, and felt compelled to define the statutory term "employee" literally, thereby concluding that foremen and other supervisors were entitled to the Act's protections.

Congress picked up the Court's cue when it enacted the 1947 amendments to the Act. As a matter of policy, the Congress felt that employer should not be forced into having unionized supervisors.

> "The evidence before the committee shows clearly that unionizing supervisors under the Labor Act is inconsistent with * * * our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants, but when the foremen unionize, even in a union that claims to be 'independent' of the union of the rank and file, they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file bosses them."

1 Legis. Hist. 305. The legislative history of Sections 14(a) and 2(3) clearly indicates that the purpose of these provisions was to reverse the result of the *Packard* case so that no employer would be required under the Act to bargain collectively with his foremen or to hire foremen who were union members.

> "What the bill does is to say * * * [t]hat no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for *any* reason, he does not trust."

1 Legis. Hist. 308. (Emphasis in original.) *See also Int. Ladies' Garment Wkrs Union* v. *NLRB*, 2 Cir., 339 F.2d 116, 122 (1964). In the words of the Senate Report:

> "It merely relieves employers who are subject to the national act free from any compulsion by this National

Board or any local agency to accord to the front line of management the anomalous status of employees."

1 Legis. Hist. 411.

While Section 14(a) provides that "no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining," it also expressly provides that "[n]othing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization • • •." The purpose of this provision is also clear from the legislative history.

"The bill does not forbid any one to organize. It does not forbid any employer to recognize a union of foremen. Employers who, in the past, have bargained collectively with supervisors may continue to do so. • • •"

1 Legis. Hist. 308.

"• • • It should be noted that all that the bill does is to leave foreman in the same position in which they were until the Labor Board reversed the position it had originally taken in 1943 in the *Maryland Drydock* case • • •. In other words, the bill does not prevent anyone from organizing nor does it prohibit any employer from recognizing a union of foremen. • • •"

1 Legis. Hist. 411.

The legislative history of Section 14(a) is important in two respects. First, it is clear that the supervisory exclusion was enacted precisely because Congress assumed that when supervisors became union members they were "obligated to those on the other side" and were "subject to the influence and control of the rank and file union." And Congress solved the conflict of loyalties problem by giving management the right to make the would-be supervisor choose beeween union loyalty and rank-and-file status on the one hand and management loyalty and supervisory status on the other.

Second, by expressly providing that foreman could unionize, and by indicating that employers who so desired could continue to bargain collectively with supervisors, Congress effectively gave employers an option. Those who wished to do so could continue to hire union members as supervisors and could continue to engage in collective bargaining with supervisors, resolving whatever conflict of loyalties problems arose through the traditional give-and-take of collective bargaining approved in *Jones & Laughlin Steel Corp., supra,* to arrive at contract clauses dealing with the problem. *See* page 36 *supra.* On the other hand, those employers who wanted to settle the conflict of loyalties problem once and for all would be within their rights in refusing to hire union members as supervisors and refusing to engage in collective bargaining with supervisors.

This option approach to an employer's rights under Section 14(a) has received the tacit approval of the courts. For example, a union commits no unfair or unlawful act in proposing that supervisors be covered by the collective bargaining agreement, *Sakrete of Northern California, Inc.* v. *NLRB,* 9 Cir., 332 F.2d 902, 908 (1964), *cert. denied,* 379 U.S. 961 (1965), but a union does commit an unfair labor practice in trying to coerce an employer into agreeing to hire only union members as foremen. *See Int.Typographical Union Local 38* v. *NLRB,* 1 Cir., 278 F.2d 6 (1960), *affirmed by equally divided Court,* 365 U.S. 705, 707 (1961). An employer is within his rights in refusing to engage in collective bargaining over supervisors, *cf. Safeway Stores, Inc.* v. *Retail Clerks Int. Assn,* 41 Cal.2d 567, 261 P.2d 720 (1953), and supervisors are routinely excluded from a certified bargaining unit at the employer's request. *See, e.g. Federal Compress & Warehouse Co.* v. *NLRB,* 6 Cir., 398 F.2d 631 (1968); *NLRB* v. *Corral Sportswear Co.,* 10 Cir., 383 F.2d 961 (1967). On the other hand, courts have approved contracts in which management agreed to hire only union members as foremen and where the conflict of loyalties problem was resolved by clauses in the collective bargaining agreement limiting the union's

right to discipline supervisor-members. *See, e.g., NLRB* v. *News Syndicate Co.*, 2 Cir., 279 F.2d 323 (1960), *affirmed*, 365 U.S. 695 (1961). *Cf. Evening Star Newspaper Co.* v. *Columbia Typographical Union No. 101*, D. D.C., 141 F. Supp. 374 (1955), *affirmed*, 98 U.S.App.D.C. 206, 233 F.2d 697 (1956).

In applying this option approach, it has always been assumed, consistent with the legislative history, *see* page 38 *supra*, that once an employer permits his supervisors to join unions or agrees to engage in collective bargaining with unionized supervisors, he no longer can claim their undivided loyalty in every employer-union dispute except to the extent that the collective bargaining agreement ensures such loyalty. *See, e.g., NLRB* v. *News Syndicate Co.*, *supra*, 279 F.2d at 330:

> "• • • The foremen, under the contract at least, were not subject to the conflicting obligations of two masters. *Regardless of the Union obligations to which, without more, a foreman would be subject by reason of his Union membership,* • • • the contract specifically provides that: 'The Union shall not discipline the foreman for carrying out the instructions of the publisher or his representative in accordance with this agreement.' • • • By these provisions the parties clearly indicated that the foremen are *solely* [this emphasis in original] the employers' agents and that they are under an obligation to act in accordance with the agreement, *in spite of Union ties and obligations which otherwise might control.* • • •"

(Emphasis added; footnote omitted.) *See also NLRB* v. *News Syndicate Co.*, 365 U.S. 695, 701 (1961); *Int. Typograhical Union Local 38* v. *NLRB*, *supra*, 278 F.2d at 12. *Cf. Local Union No. 1055* v. *Gulf Power Co.*, N.D. Fla., 175 F.Supp. 315 (1959); *Safeway Stores, Inc.* v. *Retail*

Clerks Int. Assn, supra.[24] And, until now, it seemed that the Board shared this assumption. To justify its holding that certain supervisors could actively participate in union affairs, the Board recognized that supervisor-members "owe allegiance at least as much to the Union as to their employers. They are agents of both." *Nassau and Suffolk Contractors' Assn, Inc.*, 118 NLRB 174, 182 (1957).

Thus, while now purporting to interpret Section 8(b)(1)(B) so as to enforce the underlying policy of Section 14(a) in favor of management's right to loyal supervisors, the Board in fact acts contrary to the very assumption engendering enactment of Section 14(a), namely, that when a supervisor joins a union he is under certain obligations to the union which conflict with his loyalty to his employer.

Throughout the lengthy discussion of supervisor-union member conflict of loyalties in the legistive history of the 1947 amendments, there is not a single indication that Sec-

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[24] Prior to enactment of the 1947 amendments, the Retail Clerks International Association represented store managers for collective bargaining purposes, and these managers were covered by collective bargaining agreements. In 1949, after passage of the amendments, new contract negotiations came up and Safeway announced its intention not to bargain with respect to managers any more and not to recognize the union as their representative. The union struck over this point, the trial court enjoined the strike, and the California Supreme Court affirmed:

> "• • • As members of the defendant unions [store managers] would under union rules be in duty bound to advance the cause of the community of interest of store managers and clerks in any dispute or disagreement with their principal. They would be under constant apprehension of the penalties under union rules, such as fines, suspension, or expulsion. It is eminently proper that management supervisors, the store managers in this case, be kept free from the divided loyalty that would be engendered by compulsory membership in the defendant local unions. • • •"

41 Cal.2d at ——, 261 P.2d at 726.

tion 8(b)(1)(B) was in any way related to the comprehensive solution to the conflict of loyalties problem found in Sections 2(3) and 14(a).[11] Section 8(b)(1)(B) was intended to deal with a problem separate and distinct from the problem of supervisor-union member conflict of loyalties, as is evident from the different scopes of the Section 2(3) supervisor exclusion and Section 8(b)(1)(B). The supervisor exclusion in Section 2(3), defined in Section 2(11), applies not only to individuals having authority to "adjust [employee] grievances," but also to any individual "having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees • • •." The scope of Section 8(b)(1)(B), in contrast, is much narrower, and concerns only those individuals who represent

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[11] That the supervisory exclusion in §§ 2(3) and 14(a) is unrelated to the § 8(b)(1)(B) unfair labor practice provision is further confirmed by the legislative history. Sections 2(3) and 14(a) of the 1947 amendments had their forerunners in the Case bill passed by both houses of Congress in 1946 but vetoed by President Truman. *See* H.R. 4908, 79th Cong., 2d Sess. (Jan. 14, 1946). Section 9(a) of the Case bill, just like the 1947 amendments, amended § 2(3) of the Act by adding supervisors as a class of individuals excluded from the statutory definition of "employees." Section 9(c) of the bill, just like amended § 14(a) in 1947, provided that "[n]othing herein shall prohibit a supervisory employee from becoming or remaining a member of a labor organization." The legislative history of the 1947 amendments clearly shows that §§ 2(3) and 14(a) in the 1947 amendments merely sought to reenact the provisions of the Case bill, the only difference being a minor one in the definition of supervisors. *Compare* 1 Legis. Hist. 308 *with* S. Rep. No. 1177, 79th Cong., 2d Sess., at 9-10, 17-19 (1946). *Compare* § 2(11) of the Act, 29 U.S.C. § 152(11), *with* § 9(b) of the Case bill, H.R. 4908, *supra*. What is significant for present purposes is that the Case bill, while containing virtually identical forerunners of §§ 2(3) and 14(a), did not contain any provision even remotely similar to §8(b)(1)(B).

the employer "for the purposes of collective bargaining or the adjustment of grievances." Since the scope of Section 8(b)(1)(B) is narrower than that of the supervisor exclusion in Section 2(3), the Board's approach achieves the anomalous result of having certain supervisor-members—those coming within the definitions of both Sections 2(3) and 8(b)(1)(B)—immune from all union discipline where there is a dispute between the union and the employer, while other supervisor-members—those coming within the definition of Section 2(3) but falling outside the definition of Section 8(b)(1)(B)—remain subject to union discipline. Such a dichotomy is awkward on its face, and makes no sense if one accepts the Board's assumption that under Section 14(a) a supervisor owes his undivided loyalty to his employer not only where his employer exercises his right to refuse to hire union members as supervisors, but also where the employer permits supervisors to join unions.

Not only is there no indication of any legislative purpose to make Section 8(b)(1)(B) an integral part of the solution to supervisor-union member conflict of loyalties problems, but the result achieved by the Board's interpretation of Section 8(b)(1)(B) is clearly inconsistent with the concept of union membership as understood by Congress. The "contractual conception of the relation between a member and his union widely prevails in this country . . .'" *NLRB* v. *Allis-Chambers Manufacturing Co., supra,* 388 U.S. at 182, *quoting Int. Assn. of Machinists* v. *Gonzales,* 356 U.S. 617, 618 (1958).

> "The rationale of the contract theory is that a member, by joining the union, enters into a contract, the terms of which are expressed in the union constitution and by-laws. The member consents to suspension or expulsion according to the provisions of that contract * * *. * * *"

Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1054 (1951).[35] The Board's immunity from union discipline for strikebreaking supervisors makes a shambles of the mutuality of obligation implicit in the contract approach to union membership. "Strikebreaking is uniformly considered sufficient reason for expulsion • • • for it undercuts the union's principal weapon and defeats the economic objective for which the union exists." *NLRB* v. *Allis-Chambers Manufacturing Co., supra*, 388 U.S. at 181-182 n.8, *quoting* Summers, *Disciplinary Power of Unions*, 3 IND. & LAB. REL. REV. 483, 495 (1950).

In addition, the Board's interpretation of Section 8(b)(1)(B) reaches a result inconsistent with ordinary standards of equity and fairness. In *Illinois Bell*, for example, the employer recognized the union as the exclusive bargaining agent for some of its supervisory personnel. These supervisors directly benefit from union membership, not just from the fringe benefits available to all union members, but from the contract which the union negotiates with management. True, the present contract does not determine their wages, but these employees do benefit from

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[35] Compare this conception of union membership with that of counsel for the charging party in *Illinois Bell*, who characterized the union's oath of allegiance required of new members as "mumbo jumbo in the union hall • • •." Transcript of hearing at 392. As to counsel's suggestion that the union security clause forced employees to take an oath of allegiance to the union, *see Local Union No. 749, Int. Brhd of Boilermakers, etc.* v. *NLRB*, ——U.S.App.D.C. ——, 466 F.2d 343 (1972), *cert. denied*, ——U.S.——, 41 U.S. L. WEEK 3447 (Feb. 20, 1973), which held that a union may not lawfully request an employer with whom it has a union security agreement to fire an employee who, although willing to pay the requisite union dues and fees, refuses to assume formal union membership by signing the union's membership application card. *See also NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963); *Union Starch & Refining Co.* v. *NLRB*, 186 F.2d 1008, *cert. denied*, 342 U.S. 815 (1951). *Cf.* note 27 *infra*.

other contract provisions such as that establishing vacation rights. These supervisors might benefit from a successful strike, for example, if the purpose or result of the strike was to obtain longer vacations or to improve some other condition of employment applicable to all members of the bargaining unit, supervisory or rank and file. Can it fairly be said that Congress intended that supervisor-members can perform rank-and-file struck work, undercutting a strike from which they serve to benefit, and remain immune from union discipline while all other members of the bargaining unit remain bound by the majority decision of the union to go out on strike?

The inequity in the Board's approach to Section 8(b)(1)(B) may well have been tacitly conceded by both the Board and the employer in *Florida Power* when, by stipulation, it was agreed that no unfair labor practice charge would be based on union discipline of those supervisors who were members of the bargaining unit and who had their wages and conditions of employment determined by the collective bargaining agreement. *See* note 8 *supra*. Were the Board to have applied Section 8(b)(1)(B) to union discipline of these supervisor-members, the Board would have prevented the union from disciplining strikebreaking supervisors whose very wages were the subject of the ongoing strike. We note, however, that nothing in the Board's approach would limit Section 8(b)(1)(B) so that it would not apply to union discipline of these supervisors. The Board's position is that a union cannot fine supervisor-members for "furthering the interests of the Employer in a dispute not between the Union and the supervisor-union members but between the Employer and the Union." *Local Union No. 2150, Int. Brhd. of Electrical Wkrs, supra*, 192 NLRB No. 16 (slip opinion at 6). Under such an approach it is irrelevant whether or not the supervisors are members of the collective bargaining unit and whether or not their wages and conditions of employment are negotiated for them by the union. That

the Board places no significance on the fact that supervisors are members of the collective bargaining unit represented exclusively by the union is demonstrated in *Illinois Bell* where the Board based its finding of a Section 8(b)(1)(B) violation on discipline of supervisor-members both outside and within the collective bargaining unit. *See* pages 9-10 *supra*.

Those supervisor-union members who feel that the union is not adequately representing their interests, or who feel that they do not wish to be bound to support the union in its economic disputes with management, are free at any time to resign from union membership. As the Supreme Court recently made clear, once they do so, and once they voluntarily agree to relinquish the benefits of union membership, they are no longer subject to union discipline. *See NLRB* v. *Granite State Joint Board, supra; id.* at 218 (Mr. Chief Justice Burger, concurring)." But it is unreasonable for supervisors to expect to be able to enjoy either the fringe or the direct benefits of union membership without bearing the obligation of supporting

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" Nor is it significant that the collective bargaining agreement in *Illinois Bell* contains a union security clause. That clause, like the union security clause in *Granite State Joint Board*, requires as a condition of employment that members of the bargaining unit remain union members in good standing, but provides that an employee shall be deemed to be a member in good standing "so long as he pays or tenders to the Union an amount equal to the regularly recurring monthly Union dues * * *." We intimate no views concerning a union's power to discipline members where a security clause in the collective bargaining agreement purports to require active union membership as a condition of employment. *See also Local Union No. 749, Int. Brhd of Boilermakers, etc.* v. *NLRB, supra* note 26,——U.S.App.D.C.at——n.3, 466 F.2d at 345 n.3.

the union in its economic disputes with the employer." *See NLRB* v. *San Francisco Typographical Union No. 21*, 9 Cir.,——F.2d——,——(Nos. 71-2949 & 71-2987, decided May 18, 1973) (slip opinion at 4).

The lack of equity and fairness in the Board's approach is also evident when we look at the situation from the employer's perspective. Section 14(a) gives the employer a means to obtain the undivided loyalty of his supervisors. If the employer, however, chooses not to exercise his rights under that section, permits his supervisors to join unions and agrees to engage in collective bargaining with the union over supervisors, the employer cannot still insist on the supervisors' undivided loyalty in every union-employer dispute, no matter how unrelated the subject of that dispute is to the supervisory function. The employer, of course, benefits from having supervisors continue membership in unions. He can follow the commendable practice of elevating supervisors from the rank and file, without having to compensate these supervisors for any loss in pension or death benefit rights they would incur were the employer to exercise his Section 14(a) rights and force them to resign from union membership upon achieving supervisory status.[11] Management cannot

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[10] "I question that Congress intended by Section 8(b)(1)(B) to compel unions to retain representatives of management on their membership rolls. It appears to me that individuals who aspire to be representatives of management and to receive the perquisites of management must be prepared to relinquish the benefits afforded by union membership. If they elect to eat the icing, they should eat the cake; if they choose union membership, they choose to abide by its constitution." *Local Union No. 2150, Int. Brhd. of Electrical Wkrs*, 192 NLRB No. 16 (trial examiner's decision at 6) (1971).

[11] This was apparently what motivated Illinois Bell to permit District Superintendents to remain union members. *See* text at p. 10 *supra*.

have its cake and eat it too. As Professor Gould has pointed out:

> "• • • [S]upervisors who remain union members are most often obtaining additional benefits. Frequently, they have remained members in order to retain possession of withdrawal cards which will make it less expensive for them to re-enter the trade or another plant under union jurisdiction. Under the *Allis-Chalmers* rationale, this would seem to indicate a pledge of allegiance by the supervisor and therefore should be deemed consent by such an individual to render himself liable to financial obligations where the union's interest is direct and where the conduct engaged in is somewhat distant from basic supervisory functions. If the employer is unduly harmed by such a rule, it seems to me that its obligation is to make the supervisory position financially attractive enough for the supervisor to forego the benefits of union membership and to resign."

Gould, *Some Limitations Upon Union Discipline Under the National Labor Relations Act: The Radiations of* Allis Chalmers, 1970 DUKE L.J. 1067, 1129.

This is not to say, of course, that by permitting his supervisors to join unions the employer completely waives his right to their loyalty. Even if he permits them to join unions, Section 8(b)(1)(B), as interpreted by *Oakland Mailers* and *Meat Cutters*, immunizes them from union discipline imposed from the manner in which they perform their supervisory functions. In addition, the employer is free to seek further immunity from discipline through the collective bargaining process. For example, if the employer shares the Board's fear that when supervisors are forced not to perform rank-and-file struck work they become biased against the employer in the later performance of their supervisory functions, the employer may condition his permission for supervisors to remain union members upon the union's agreeing to a bargaining contract clause that immunizes supervisors from union

discipline for performing rank-and-file struck work. As we have already seen, such an agreement by which the employer permits supervisors to join unions upon condition that the union give up part of its control over the supervisors is a mode of dealing with the problem of supervisor conflicts of loyalty that, in contrast to the Board's approach, has a firm basis in history both before and after passage of the 1947 amendments. Not only is it historically sound, but it comports with the Act's pervasive focus on collective bargaining as the means for resolving labor-management conflicts. *See Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45, (1937). Where the employer has bargained for immunity from union discipline for his supervisors, such a clause may be enforced through the normal grievance adjustment procedure or arbitration machinery established in the contract to resolve alleged contract violations.[20] But where the employer has agreed to union membership for his supervisors without obtaining in return some concession from the union with respect to the immunity of supervisors from discipline, interpreting Section 8(b)(1)(B) so as to make the supervisor subject to an undivided loyalty to his employer in all union-employer disputes permits the employed to abrogate its part of the bargain. We can "discern no basis in the statutory policy encouraging collective bargaining for giving the employer a better bargain than he has been able to strike at the bargaining table." *Scofield* v. *NLRB*, *supra*, 394 U.S. at 433.

To be sure, the Labor Board is entitled to great deference when it interprets the act it administers. *See, e.g.*,

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[20] Accordingly, we need not decide in these cases whether in disciplining supervisors the unions violated provisions of the collective bargaining agreement (or the Letter of Understanding in *Illinois Bell*) which might be read to restrict the union's right to discipline supervisors. *See* text at pp. 7 & 10 *supra*.

Brooks v. *NLRB*, 348 U.S. 96 (1954); *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945). But this deference has its limits. In the final analysis, "administrative experience is of weight in judicial review only to this point—it is a persuasive reason for deference to the [Board] in the exercise of its discretionary powers under and within the law. It cannot be invoked to support action outside of the law. And what action is, and what is not, within the law must be determined by courts, when authorized to review, no matter how much deference is due to the agency's fact finding. Surely an administrative agency is not a law unto itself . . . ." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 215 (1947) (Mr. Justice Jackson, dissenting).

Where, as here, the Board's interpretation of the statute cannot be derived from the statutory language or from prior Board precedent, and where that interpretation conflicts with Supreme Court precedent, with the legislative history, and with basic principles of fairness, the Board acts outside the law. Section 8(b)(1)(B) cannot reasonably be read to pinpoint discipline of union members—supervisors though they be—for performance of rank-and-file struck work.

Reversed and remanded.

LEVENTHAL, *Circuit Judge*, with whom *Circuit Judge* MCGOWAN joins, *concurring*: I concur in the opinion for the court authored by Judge Wright, which includes what I think are the salient points of this case. My separate word is not in derogation of that opinion but is added, first, to note that the same result obtains even if there should be disagreement with some aspects of the court's opinion, and second because I think the soundness of our result is understood by thinking of this case in a large context of Congressional policy on upward mobility of labor.

Congress did not accept the view that supervisors, such as foremen, are necessarily and for all purposes to be identified as completely integrated in management. Fore-

men are officers of management, but of a special kind; like non-commissioned sergeants, they bear a special relationship to the employee troops, one that promotes two-way communication and working relationship, and is of unique value to the entire enterprise.

There would be no problem if Congress had accepted a clear-cut view of foremen, as wholly integrated with management. This they could have done, by excluding foremen from employees' unions, or removing them from any union discipline, a course that was counseled in the name of good sense.[1] But as in so many other aspects of labor-management legislation, Congress was more interested in an accommodation of tensions than the tidiness of abrupt solutions.[2]

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[1] *See* Statement of Senator Ball, II Legislative History of the Labor Management Relations Act, 1947 (N.L.R.B. 1984) at 1524, quoted in Meat Cutters Union Local 81 v. N.L.R.B., 147 U.S.App.D.C. 375, 381 n.16, 458 F.2d 974, 980 n.16 (1972).

[2] In Carpenters' Union v. Labor Board, 357 U.S. 93, 99-100, Mr. Justice Frankfurter described the compromises inherent in the Taft-Hartley Act, and the judicial path to observing them, as follows:

It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests. This is relevant in that it counsels wariness in finding by construction a broad policy against secondary boycotts as such when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to to secure its embodiment in enacted law. The problem raised by these cases affords a striking illustration of the importance of the truism that it is the business of Congress to declare policy and not this Court's. The judicial function is confined to applying what Congress has en-

One thing Congress did do was to give a complete option to any employer who placed paramount value on complete and unquestioned loyalty in the foreman. That employer has the absolute and unqualified right to insist that no foreman or supervisor be a member of an employee's union § 14(a), 29 U.S.C. § 164(a) (1970).

Such an employer attitude, however, involves costs to the employer who appreciates the benefits to the enterprise from the upward mobility of labor. Not a few enlightened managements are on the lookout for talent in the ranks, able to infuse management levels with the special awareness, aptitudes and attitudes of production experience.

Mobility of union labor is restricted if departure from the union means surrender of existing or prospective economic benefits. Such surrender requirements are not a rarity in the various benefit and insurance plans sponsored by labor unions. Congress might conceivably have required that such plans be revised so as to "vest" economic benefits on reasonable terms. But it has not yet even required vesting in the more glaring case of employer pension plans, which often remove pension rights on transfers to other employers, thus limiting mobility of labor.[3]

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[3] (continued)
acted after ascertaining what it is that Congress has enacted. But such ascertainment, that is, construing legislation is nothing like a mechanical endeavor. It could not be accomplished by the subtlest of modern "brain" machines. Because of the infirmities of language and the limited scope of science in legislative drafting, inevitably there enters into the construction of statutes the play of judicial judgment within the limits of relevant legislative materials.

[3] Roark v. Boyle, 142 U.S.App.D.C. 390, 397-98, 439 F.2d 497, 504-05 (1970).

The option given by Congress is an accommodation to employers, enabling them to permit their supervisors to stay on as members of an employers' union, without surrender of the economic benefits available to members of the union.

The foremen who are permitted by their employers to maintain membership in the ranks of both union and management will have dual ties, and there is the prospect of clash and tension. That tension may not be entirely felicitous so far as management is concerned, but when elected by the employer it reflects a trade-off, making it preferable to available alternatives.

The employer is protected by the statute against the coercion implicit in certain union exercise of control over members. The clear language of the statute protects supervisors against discipline as union members, and means the control of the union must give way, when there is a question of union control over the choice of a supervisor,[4] or interference with the performance of the supervisor in "adjusting grievances."[5]

Whether or to what extent this approach may be extended to limit union control over members in other respects, it cannot be extended to the cases before us, which lie at the opposite end of the spectrum. A union member who performs rank-and-file struck work executes an act which is inherently destructive of the existence of the union. In contemplating that supervisors might continue as members of the union, Congress did not contemplate that the unions would have to surrender the elemental right

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[4] *See* cases cited in the majority opinion at p. 14.

[5] San Francisco-Oakland Mailers' Union No. 18, 172 NLRB No. 252 (1968).

of self-preservation, and to continue the good standing of agents of its own destruction.[*]

This case does not involve a management instruction to a foreman to perform managerial or supervisory work. Indeed Illinois Bell did not issue any instruction relative to the supervisors to work during the strike. If the management wishes to take the position that even rank-and-file work is the duty of a supervisor during a strike, then that is such an incursion on a union's elemental right of self-preservation as to require management to prohibit the supervisor from remaining with the union. A management insisting on absolute loyalty, to such an extent, must bear the potential expense of the economic right supervisors will surrender by withdrawing from the union.

I do not take *Meat Cutters, supra* note 1, to be in conflict with this view. That case involved the implementation by a manager of a Safeway store of a company directive to terminate the grinding and slicing of certain meats at the retail stores, and to henceforth fill market needs by ordering meat in prepared form from a warehouse. While

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[*] *See* Allis Chalmers, 388 U.S. 175, 181-82 (1967), where the Court observed that "'[t]he power to fire or expel strikebreakers is essential if the union is to be an effective bargaining agent. . . .'", *citing* Summers, Legal Limitations on Union Discipline, 64 HARV L. REV. 1049 (1951). It then noted that "Provisions in union constitutions and bylaws for fines and expulsion of recalcitrants, including strikebreakers, are therefore commonplace and were commonplace at the time of the Taft-Hartley amendments."

Similarly, the 1947 Taft-Tartley Act language including the ban on secondary boycotts was not applied literally, but was held to be subject to an implied exception excluding from the ban the traditional weapon of primary picketing. NLRB v. International Rice Milling Co., 341 U.S. 665, 670-71 (1951). This approach was confirmed in the 1959 amendments. Grain Elevator, Flour & Feed Mill Workers v. NLRB, 126 U.S.App.D.C. 219, 223-224, 376 F.2d 774, 778-79 (1967).

the implementation of this management decision had the effect of eliminating some work for the Union Local 81,[7] it was not inherently destructive of the Union. Without reconsidering the broad sweep of the doctrines of "indirect" interference and management loyalty voiced in *Meat Cutters*, they must be taken in the light of the factual problem then before the court, and cannot soundly be extended so as to prohibit union discipline of supervisors who perform rank-and-file struck work.

The limits on the protection for management loyalty are clearly posed by these cases, and reflect, I believe, an underlying congressional policy on the question of upward mobility in the labor market. Congress permits the employer to permit a rank-and-file work to upgrade his employment situation by becoming a supervisor without surrendering certain rights as a member of an employees union. When, however, the transition is complete, and the supervisor is to side with management over the very existence of the union, the supervisor and management must make a choice and assume the consequences.

MacKinnon, *Circuit Judge*, with whom Tamm, Robb and Wilkey, *Circuit Judges*, join, *dissenting*: The majority expresses its approval of the Board's interpretation of section 8(b)(1)(B)[1] as set out in *Oakland Mailers* and its progeny. In *Oakland Mailers* the Board held illegal union actions which "were designed to change the employer's) representatives from persons representing the viewpoint of management to persons responsive or subservient to

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[7] 147 U.S. App. D.C. at 378 n. 7, 458 F.2d at 797 n.7.

[1] 29 U.S.C. § 158(b)(1)(B) (1970) provides:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce * * * (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

(the union's) will."[2] In reaching the conclusion that the union's imposition of discipline on supervisors because of the manner in which they interpreted and applied the collective bargaining agreement violated section 8(b)(1)(B), the Labor Board noted:

> In enacting Section 8(b)(1)(B) Congress sought to prevent the very evil involved herein—union interference with an employer's control over its own representatives. *That* [*the union*] *may have sought the substitution of attitudes rather than persons, and may have exerted its pressure upon the* [*employer*] *by indirect rather than direct means, cannot alter the ultimate fact that pressure was exerted here for the purpose of interfering with the* [*employer's*] *control over its representatives. Realistically, the Employer would have to replace its foremen or face de facto nonrepresentation by them.*[3]

Thus, there is unanimous agreement on this court that section 8(b)(1)(B) prohibits union discipline of supervisory personnel for acts performed by them in the course of their supervisory or managerial duties. However, there is considerable disagreement as to whether a supervisor's performance of rank-and-file work during a strike at the direction of his employer constitutes part of his supervisory or managerial duties protected by section 8(b)(1)(B). Basically the majority's position is that the Board has stretched section 8(b)(1)(B) to the breaking point, in light of the

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[2] San Francisco-Oakland Mailers' Union No. 18, 172 NLRB 2173 (1968).

[3] *Id.* (emphasis added). *See* New Mexico District Council of Carpenters, 177 NLRB 500, (1969), *enfd.*, 454 F.2d 1116 (10th Cir. 1972).

legislative history of that section and sections 2(3)[4] and 14(a),[5] and the *Allis-Chalmers*[6] case, when it has sought to prohibit the union discipline of these supervisors. I find many defects in the majority's analysis, and shall deal with the pertinent statutes and Legislative history first, and take the Allis-Chalmers case lastly.

Underlying much of the majority's criticism of the Board's decision is the belief that a strike is "totally unrelated" to the collective bargaining process. Thus, the majority argues that even if the union's discipline here has the effect of making a supervisor pro-union during the

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[4] 29 U.S.C. § 152(3) (1970) provides:

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

[5] 29 U.S.C. § 164(a) (1970) provides:

(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined here as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

[6] N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967).

strike, it "does not follow that this change in attitude will affect his performance of his collective bargaining or grievance adjustment function." This is because, it is argued, when a supervisor performs rank-and-file work during a strike at the direction of his employer "he is no longer acting as a management representative." Whereas, when a supervisor performs his normal supervisory work, engages in collective bargaining, or adjustment of grievances, he is clearly acting as a management representative. Since, in the majority's view, performing struck work during a strike at the request of management is "unrelated" to the performance of his supervisory function, a supervisor will never be forced into the situation of having to serve two masters, as the Board found would be the case—for he "will be serving them at different times."

The majority's reasoning ignores the realities of the collective bargaining process. A strike is *not* "totally unrelated" to the supervisor's performance of collective bargaining functions. As the Board argued before this court, "the outcome of an economic strike . . . determines the substance of an agreement between the disputing parties and is thus a far more fundamental dispute, and one with more at stake, than a quarrel over the interpretation of a portion of a previously negotiated agreement or over its application to a given situation or individual.'" It is well recognized that "the use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; *it is part and parcel of the process of collective bargaining.*" *N.L.R.B.* v. *Insurance Agents International Union*, 316 U.S. 477, 495 (1960) (emphasis added). It is readily apparent, therefore, that when supervisors' actions during an economic strike further the interests of their employer, they are performing in a manner which could reasonably be expected from such persons. *See Local Union No. 3150, I.B.E.W.*, 192 NLRB No. 16 (1971). *See also, Texas Co.* v.

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[1] Brief for the National Labor Relations Board at 15-16.

N.L.R.B., 198 F.2d 540 (9th Cir. 1952). As management representatives, supervisory personnel may be requested by management to enhance the bargaining position of their employer during a dispute between it and the particular union involved.[8] Yet this is the precise activity for which the supervisors in question were disciplined by these unions.

Not only has the majority taken an unrealistic look at the role of a strike in the collective bargaining process, it completely disregards the Labor Board's assessment of what will be the realistic consequences of union discipline of supervisors during confrontations between the union and the employer. In both these cases the Board relied on its analysis of the same issue in *Local Union No. 2150, I.B.E.W.*, decided the same day as *Illinois Bell Telephone*, wherein the Board found that

> [t]he Union's fining of the supervisors who were acting in the Employer's interest in performing the struck work severely jeopardized the relationship between the Employer and its supervisors. Thus, *the fines*, if found to be lawful, *would now permit the Union to drive a wedge between a supervisor and the Employer, thus interfering with the performance of the duties the Employer has a right to expect the supervisor to perform.* The Employer could no longer count on the complete and undivided loyalty of those it has selected to act its collective bargaining agents or to act for it in adjusting grievances. Moreover,

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[8] There is no question that supervisors enhance the bargaining position of their employer when they perform rank-and-file work during a strike, since their actions reduce the severity of the economic pressure borne by their employer as a result of the work stoppage.

such fines clearly interfere with the Employer's control over its representatives.*

The Labor Board has drawn an inference from the evidence before it, concluding that the unions' discipline of these supervisors will interfere with the performance of their supervisory duties. Such inferences are not to be disturbed by a reviewing court merely because in its own opinion it disagrees with the rightness of the Board's judgment. *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 48-50 (1954); *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 488, 490 (1951); *N.L.R.B.* v. *Nevada Consolidated Copper Corp.*, 316 U.S. 105 (1942). Rather, as with other findings of fact, the proper test is whether the inference is supported by substantial evidence in the record. And under this standard, I see no reason to disagree with the Board's assessment of the effect of the union discipline upon the supervisor-employer relationship.

Further, the majority embraces a rule which makes the *type* of work a supervisor performs during a strike the determinative factor in section 8(b)(1(B) cases involving the legality of union discipline. This distinction makes no sense from the standpoint of the Congressional purpose underlying section (8(b)(1)(B), 2(3), and 14(a). The Board's present interpretation of section 8(b)(1)(B) was set out in *Local Union No. 2150 I.B.E.W.*, wherein it quoted from *Toledo Blade:*

> The Board's decision in the *San Francisco Mailers* case, underscores the . . . import of Section 8(b)(1)(B) as a general prohibition of a union's disciplining su-

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*Local Union No. 2150, I.B.E.W., 192 NLRB No. 16, slip op. at 6-7 (1971) (emphasis added). *See* New Mexico District Council of Carpenters, 177 NLRB 500, 502 (1969), *enfd.*, 454 F.2d 1116 (10th Cir. 1972); Meat Cutters Local Union No. 81 v. N.L.R.B., 147 U.S.App.D.C. 375, 379-80, 458 F.2d 794, 798-99 (1972); N.L.R.B. v. Locals Nos. 15-P and 272, Lithographers, 437 F.2d 55, 57 (6th Cir. 1971); N.L.R.B. v. Sheet Metal Workers, Local 49, 430 F.2d 1348, 1349 (10th Cir. 1970).

pervisor-members for their conduct in the course of representing the interests of their employers. As the Board held, such discipline by a union, even though the employer may have consented to the compulsory union membership of the supervisor under a union-security clause, is an unwarranted "interference with [the] employer's control over its own representatives," and deprives the employers of the undivided loyalty of the supervisor to which it is entitled.[10]

When a union disciplines a supervisor for crossing a picket line to perform rank-and-file work at the request of his employer, that discipline *equally* interferes with the employer's control over his representative and *equally* deprives him of the undivided loyalty of that supervisor as in the case where the discipline was imposed because of the way the supervisor interpreted the collective bargaining agreement or performed his "normal" supervisory duties. Thus, if the Board's construction of section 8(b)(1)(B) can be sustained, the majority's distinction of the type of work the supervisor performs during the strike would be without justification.

The Board's construction of 8(b)(1)(B), as prohibiting union discipline of supervisors for furthering the interests of their employer during disputes between the union and the employer, rests upon the legislative history of that section, and sections 2(3) and 14(a). The Supreme Court has recognized the fact "that labor legislation is peculiarly the product of legislative compromise of strongly held views, *Local 1976, Carpenters' Union* v. *Labor Board*, 357 U.S. 93, 99-100, and that legislative history may not be disregarded merely because it is arguable that a provision may unambiguously embrace [or not embrace] conduct called in question. *National Woodwork Mfrs. Assn.*

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[10] Local Union No. 2150, I.B.E.W., 192 NLRB No. 16, slip op. at 5 (1971).

v. *N.L.R.B.*, 386 U.S. 612, 619-620."[11] When Congress was considering amendments to the National Labor Relations Act in 1947, it was acutely aware of the fact that unions had previously "taken it upon themselves to say that management should not appoint any representative who [was] too strict with the membership of the union," and through the enactment of section 8(b)(1)(B) it endeavored "to prescribe a remedy in order to prevent such interferences."[12] Although this fact is highly pertinent to an evaluation of the proper scope of section 8(b)(1)(B), other legislative history surrounding the 1947 amendments must also be considered.

Section 8(b)(1)(B) must not be interpreted in a vacuum, but must be interpreted in conjunction with the other 1947 amendments to the N.L.R.A. relating to supervisory personnel.[13] The fact that Congress decided to expressly exclude "supervisors" from the statutory definition of "employee" in section 2(3) is highly informative.

> Congress was aware of the potential conflict between the obligations of foremen as representatives of their employers, on the one hand, and as union members, on the other. Section 2(3) evidences its *intent to make the obligations to the employer paramount.* That provision excepts foremen from the protection of the Act. Its purpose was to give the employer a free hand to discharge foremen as a means of *ensuring their undivided loyalty, in spite of any union obligations.* See H. Rep. No. 245, 80th Cong., 1st Sess. 14-17 (1947); S. Rep. No. 105, 80th Cong., 1st Sess. 3-5 (1947); L.A. Young Spring & Wire Corp. v. National

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[11] N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 179 (1967).

[12] 93 Cong. Rec. 4266 (1947) (remarks of Sen. Ellender), in II *Legislative History of the Labor Management Relations Act. 1947* at 1077.

[13] *See* sections 2(3), 2(11) and 14(a), 29 U.S.C. §§ 152 (3), 152(11) and 164(a) (1970).

Labor Relations Board, 1947, 82 U.S.App.D.C. 327, 163 F.2d 905, certiorari denied 1948, 333 U.S. 837 • • •[14]

In *Meat Cutters* we considered this prior analysis of the 1947 legislative history and concluded that "[a] supervisor's obligations to his union simply cannot detract from the absolute duty, evidenced by section 8(b)(1)(B), which he owes to his employer when exercising his managerial authority."[15]

The majority correctly recognizes that sections 2(3) and 14(a) were expressly enacted to resolve the conflict of loyalties problem resulting from unionization of supervisors. However, it has completely misinterpreted the legislative solution to that problem which Congress enacted in sections 2(3) and 14(a). There is just no support in the language of those sections or in the legislative history for the majority's interpretation that "Congress effectively gave employers an *option*" to prohibit unionization thereby ensuring undivided loyalty, or to permit unionization and thereby accept divided loyalty from their supervisors. What Congress *did* do in sections 2(3) and 14(a) was to solve the conflict of loyalties problem once and for all by taking supervisors completely out of the operation of the Act. Congress provided that there was nothing intended to prevent unionization of supervisors, even in rank-and-file unions, but even if unionized supervisors were to enjoy no protection from the Act. Congress did not give employers the means to *opt* for the undivided loyalty of their supervisors—it guaranteed it itself by enacting sections 2(3) and 14(a).

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[14] Carpenters Dist. Council of Milwaukee v. N.L.R.B., 107 U.S.A.App.D.C. 55, 57, 274 F.2d 564 566 (1959) (emphasis added).

[15] Meat Cutters Union Local 81 v. N.L.R.B., 147 U.S.App. D.C. 375, 381, 458 F.2d 794, 800 (1972).

By the very terms of section 2(3), supervisors, as defined in section 2(11),[14] are excluded from the statutory definition of "employee", and thus taken out of the operation of the Act. This was the legislative solution to the conflict of loyalties problem experienced when supervisors unionized—thereby incurring certain rights under the Act and at the same time being subjected to union influence. Congress concluded that supervisors should be considered to be a part of management, and that the only way to guarantee the undivided loyalty of supervisors to their employer was to take them out of the operation and protection of the Act. Thus, the Senate Report, in noting what major changes the Taft-Hartley Bill would make in the National Labor Relations Act, stated, "It eliminates the genuine supervisor from the coverage of the act as an employee and makes clear that he should be deemed a part of management." S. REP. No. 105, 80th Cong., 1st Sess. 3 (1947), in I *Legislative History of the Labor Management Relations Act* at 409 [hereinafter cited as *Legis. Hist.*]. Similarly, the House Report noted that "[s]upervisors are management people," and concluded that

> *Congress must exclude foremen from the operation of the Labor Act, not only when they organize into unions of the rank and file and into unions affiliated with those of the rank and file, but also when they organize into unions that claim to be independent of the unions of the rank and file.*

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[14] 29 U.S.C. § 152 (11) (1970) provides:
The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote discharge, assign, reward, or discipline other employees, or responsibly to direct then or to adjust grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

H. R. Rep. No. 245, 80th Cong., 1st Sess. 15-16 (1947), in I *Legis. Hist.* at 306-307 (emphasis in original). The legislative understanding was that even if supervisors organized, they were to be considered "management people" outside the operation of the act.

The explanatory comments of committee members also support this interpretation. Senator Taft explained:

> It is felt very strongly by management that foremen are part of management; that it is impossible to manage a plant unless the formen are wholly loyal to the management. We tried various in between steps, but the general conclusion was that they must either be a part of management or a part of the employees. It was proposed that there be separate foremen's union not affiliated with the men's unions, but it was found that that was almost impossible; that there was always an affiliation of some sort; that foremen, in order to be successful in a strike, must have the support of the employees' union. A plant can promote other men to be foremen if necessary. The tie-up with the employees is inevitable. *The committee felt that foremen either had to be a part of management and not have any rights under the Wagner Act, or be treated entirely as employees, and it was felt that the latter course would result in the complete disruption of discipline and productivity in the factories of the United States.*

93 Cong. Rec. 3952 (1947), in II *Legis. Hist.* at 1008-1009 (emphasis added). Likewise, Sen. Ball commented:

> The committee took the position that foremen are an essential and integral part of management, and that to compel management to bargain with itself, so to speak, by dividing the loyalties of foremen between the union and the employer, simply did not make sense, and inevitably would prove harmful to the free-enterprise system. It might be stated that both the House and Senate bills deal with that subject in substantially the same way.

93 Cong. Rec. 5146 (1947), in II *Legis. Hist.* at 1496. *See also*, 93 Cong. Rec. A2012-13 (1947) (remarks of Rep. Meade), in I *Legis. Hist.* at 868-69; 93 Cong. Rec. 4411 (1947) (remarks of Sen. Smith), in II *Legis. Hist.* at 1148; 93 Cong. Rec. 4260 (1947) (remarks of Sen. Ellender), in II *Legis. Hist.* 1064-65.

The majority finds its option argument in the language and legislative history of section 14(a). Of course, the legislative history of that section is intimately bound up in that of section 2(3), and cannot be looked at separately.[17] The legislative history clearly indicates that section 14(a) was intended to do nothing more than make clear that an employer could not be compelled to treat his supervisors like other statutory "employees," even if they remained in the union. This follows directly from the exclusion of supervisors from the definition of "employee" in section 2(3). There is just nothing in the legislative history to indicate that Congress assumed that if an employer permitted his supervisors to remain in the union, he thereby impliedly accepted their dual loyalty.

What *is eminently* lucid from the legislative history is that Congress thought it was providing that even if a supervisor remained in a union, he had no protection or coverage under the act, and had to rely solely on the benevolence of his employer. Thus, the House Report states, "The bill does not forbid these people [*i.e.*, supervisors] to organize. It merely leaves their organizing and bargaining activities outside the provisions of the act." H.R. Rep No. 245, 80th Cong., 1st Sess. 23 (1947), in I *Legis. Hist.* at 314. *See also*, S. Rep. No. 105, 80th Cong., 1st Sess. 5 (1947), in I *Legis. Hist.* at 411; S. Min. Rep. No. 105, pt. 2, 80th Cong., 1st Sess. 39 (1947), in I *Legis. Hist.* at 501. Again, the remarks of the committee are informa-

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[17] *See, e.g.*, S. Rep. No. 105, 80th Cong., 1st Sess. 5 (1947), in I *Legis. Hist.* at 411; Meat Cutters Local Union No. 81 v. N.L.R.B., 147 U.S.App.D.C. 375, 380-81, 458 F.2d 794, 799-800 (1972).

tive. For example, Rep. Hartley noted, "This bill also exempts supervisors from the compulsory features of the National Labor Relation Act. In other words, this bill does not bar them from organizing but they cannot obtain the benefits of the act." 93 CONG. REC. 3533 (1947), in I *Legis. Hist.* at 613. *See also,* 93 CONG. REC. 3952 (1947) (remarks of Sen. Taft), in II *Legis. Hist.* at 1008.

The fact that section 14(a) also provides that "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization" does not in any way support the majority's option argument. This statement was *not* intended "to expressly provide that foremen could unionize" at the employer's will, as the majority argues, for there was nothing in the 1947 Amendments which would have prevented such unionization.[18] The statement was without material effect, and "was included presumably out of an abundance of caution." H. CONF. REP No. 510, 80th Cong., 1st Sess. 60 (1947), in I *Legis. Hist.* at 564.[19] This almost superfluous provision obviously cannot legitimately serve as a cornerstone for any interpretation of the legislative solution to the conflict of loyalties problem enacted by the 80th Congress.

The majority maintains that the case law has always assumed that once an employer permits his supervisors to

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[18] S. REP. No. 105, 80th Cong., 1st Sess. 28 (1947), in I *Legis. Hist.* at 434 states, "Section 14: This is a new section which *makes it clear* that the amendments to the act do not prohibit supervisors from joining unions, but that it is contrary to national policy for other Federal or State agencies to compel employers who are subject to the National Board to treat supervisors as employees for the purpose of collective bargaining or organizational activity" (emphasis added).

[19] The legislative history contains a number of references to the fact there was no intent to prevent unionization of supervisors, but merely to take them out of the operation of the Act—thus leaving them only with self-help protections. *See* pp. 66-67, *supra.*

join unions, he can no longer claim their undivided loyalty in disputes with the union. Yet the cases it cites for this proposition all pre-date the Board's decision in *Oakland Mailers*, wherein the Board faced the issue of union discipline of supervisors for the first time and admittedly expanded the interpretation of section 8(b)(1)(B).[20] The cases since *Oakland Mailers* indicate that merely because an employer may have consented to the compulsory union membership of his supervisors under a union-security provision does not negate his right to the full protection of section 8(b)(1)(B). *See Meat Cutters Union Local 81* v. *N.L.R.B.*, 147 U.S.App.D.C. 375, 458 F.2d 794 (1972); *Toledo Local Nos. 15-P and 272*, 175 NLRB 1072, 1080 (1969), *enfd*, 437 F.2d 55 (6th Cir. 1971); *Local Union No. 2150, I.B.E.W.*, 192 NLRB No. 16, slip op. at 5 (1971). And in *Meat Cutters* we specifically rejected the union's argument that section 14(a) expressed an intent to subject supervisor/members to the full control of the union, concluding that it is readily apparent "when all the relavant 1947 amendments to the Act are considered in concert, that Congress did not intend thereby to allow unions to subvert the 'undivided loyalty' it clearly believed such managerial personnel owe to their respective employers."[21]

In my view the Board's interpretation of section 8(b)(1)(B) as proscribing union discipline of supervisors for furthering the interests of their employer by performing struck work expressly at his request does not stretch that section to the breaking point, but is fully justified in light of the legislative history and the other sections dealing with supervisors.

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[20] The Board informed us at oral argument, and my own research has not contradicted their assertion, that *Oakland Mailers* was the first case in which it faced the issue of the extent to which section 8(b)(1)(B) prevents union discipline of supervisors/members for performing managerial duties.

[21] 147 U.S.App.D.C. at 381, 458 F.2d at 800.

III.

The majority attempts to draw significant support for its construction of section 8(b) (1)(B) from *Allis-Chalmers*,[23] which it characterizes as "indistinguishable from these cases." It is my view that a close analysis of *Allis-Chalmers and Scofield*[24] reveals nothing which would relieve the unions from responsibility under section 8(b) (1)(B) for these fines. First, it is vitally important to remember that *Allis-Chalmers* involved section 8(b)(1) (A),[25] not 8(b)(1)(B).[26] While both contain the common language "to restrain or coerce," the two provisions protect completely different interests in quite different ways. Section 8(b)(1)(A) was only intended to impose some slight controls upon the union-*employee* relationship, and the legislative history makes clear that Congress did not intend extensive regulation of the *internal* union-employee/member relationship. *See N.L.R.B.* v. *The Boeing Co.*, 41 U.S.L.W. 4678, 4679 (U.S. May 21, 1973); *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 183-195 (1967). *See also, National Maritime Union*, 78 NLRB 971, 982-87 (1948), *enfd.* 175 F.2d 686 (2d Cir. 1949), *cert. denied*, 338 U.S. 954 (1950). Section 8(b)(1)(B), on the other hand, was intended to regulate the *external* union-*employer* relationship. No amount of union coercion or interference with an employer's selection or control of his representatives for the purpose of collective bargaining or adjustment of grievances was permitted.

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[23] 388 U.S. 175 (1967).

[24] 394 U.S. 423 (1969).

[25] 29 U.S.C. § 158(b) (1) (A) (1970) provides:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

[26] See note 1, *supra*.

Second, in upholding the union fines in *Allis-Chalmers* and *Scofield*, while the Supreme Court did not rely upon the express language of the proviso to section 8(b)(1)(A),[36] as the Labor Board had originally done in *Minneapolis Star and Tribune Co.*, 109 NLRB 727 (1954), it did draw "cogent support" for its decision from it.[37] *See N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 191-92 (1967); *Scofield* v. *N.L.R.B.*, 394 U.S. 423, 428 (1969). *See also, Gould, Some Limitations Upon Union Discipline Under the National Labor Relations Act; The Radations of Allis-Chalmers*, 1970 DUKE L. J. 1067, 1128 (1970). The applicability of that proviso, however, is clearly limited to section 8(b)(1)(A). It is not a part of section 8(b)(1)(B), which directly regulates only the union-members relationship.[38] Therefore, to the extent that *Allis-Chalmers* and *Scofield* draw "cogent support" from that proviso for their holdings, that rationale cannot lend support to disciplining "supervisors" where the cases arise under section 8(b)(1)(B).

In the majority's view the "one thing that is clear" from *Allis-Chalmers* is that there is no overriding policy of the labor laws which prohibits reasonable union fines levied against its members who cross a lawful picket line to perform rank-and-file struck work. A union has a right to assure solidarity in its ranks by imposing fines to prevent

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[36] *See* note 24, *supra*.

[37] *Compare* Booster Lodge No. 405 Int. Assn. of Machinists v. N.L.R.B., U.S.App.D.C. 119, 125, 459 F.2d 1143, 1149 (1972), *aff'd in part*, 41 *U.S.L.W.* 4683 (U.S. May 21, 1973) *with* Meat Cutters Union Local 21 v. N.L.R.B., 147 U.S.App.D.C. 375, 381, 458 F.2d 794, 800 (1972).

[38] *See* San Francisco-Oakland Mailers' Union No. 18, International Typographical Union, 172 NLRB 2173 (1968); Price v. N.L.R.B., 373 F.2d 443, 446 (9th Cir. 1967), *cert. denied*, 392 U.S. 904 (1968); Meat Cutters Union Local 81 v. N.L.R.B. 147 U.S.App.D.C. 375, 381-82, 458 F.2d 794, 800-801 (1972). *See also II Legis. Hist.* at 1139, 1141, and 1200.

strike breaking by its members. This reasoning, the majority argues, is directly applicable to the situation here. The defect in this argument is that it fails to recognize the fundamental distinction which Congress made between *employees* and *supervisors*, even if the latter were members of a union. In *Allis-Chalmers* the Court was faced only with the situation of union discipline of *employee*/members. Thus, the Court there began by noting that

> National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. . . . The employee may disagree with many of the union decisions but is bound by them. "The majority rule concept is today unquestionably at the center of our federal labor policy."[29]

It was in this context that the Court proceeded to acknowledge the importance of a union's power to discipline its members to protect against erosion of its status. "The power to fine or expel a strike breaker 'is essential if the union is to be an effective bargaining agent.' "[30]

In contrast, in the instant cases we are confronted with union discipline of *supervisor* members, which Congress said in the Taft-Hartley amendments were to be "deemed a part of management."[31] It was largely for the reason that because a usual union member *is* subservient to the will of the majority, Congress took supervisors out of the operation of the Act—to make them subservient to the

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[29] 388 U.S. at 180 (footnote omitted).

[30] N.L.R.B. v. Marine Workers, 391 U.S. 418, 423 (1968) quoting from N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 181 (1967).

[31] S. Rep. No. 105, 80th Cong., 1st Sess. 3 (1947), in I *Legis. Hist.* at 409.

will of the employer and *not* the union.[33] Certainly management has an equal right under our federal labor policy to promote strike solidarity among its supervisory personnel as does a union to promote solidarity from its members.[34] Where these two rights clash, as they do here, the legislative pronouncements of sections 2(3), 14(a) and 8(b)(1)(B) indicate to me that the interest of the employer in having loyal supervisors under his control must prevail.

Further, as the majority acknowledges, Supreme Court decisions subsequent to *Allis-Chalmers* have emphasized that the *Allis-Chalmers* rationale only permits "a union • • • to enforce a properly adopted rule which reflects a legitimate union interest [and] *impairs no policy Congress has imbedded in the labor laws.*" *Scofield* v. *N.L.R.B.* 394 U.S. 423, 430 (1969) (emphasis added), *and see* 394 U.S. at 429, 432. *See N.L.R.B.* v. *The Boeing Co.*, 41 U.S.L.W. 4678, 4679 (U.S. May 21, 1973), *N.L.R.B.* v. *Marine Workers*, 391 U.S. 418 (1968); *Booster Lodge No. 405, Int. Assn. of Machinists* v. *N.L.R.B.*, 148 U.S.App.D.C. 119, 126, 459 F.2d 1143, 1150 (1972), *aff'd in part*, 41 U.S.L.W. 4683 (U.S. May 21, 1973).[35] And, as previously developed, sections 2(3), 14(a) and 8(b)(1)(B) do embody such a congressional policy—to ensure the undivided loyalty of super-

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[33] *See* majority opinion at 37, *supra*.

[34] The Senate Report indicates that in exempting supervisors from the operation of the Act, Congress was concerned about restoring some semblance of a balance of collective bargaining power between unions and employers. The Report found that the organization of supervisors with the resulting rights under the National Labor Relations Act "probably more than any other single factor ha[d] upset any real balance of power in the collecting-bargaining process. . . ." S. REP. No. 105, 80th Cong., 1st Sess. 3 (1947), in I *Legis. Hist.* at 409.

[35] *See also*, N.L.R.B. v. International Molders and Allied Workers Union, 442 F.2d 92, 94 (7th Cir. 1971).

visors to their employer without interference from unions —which would be impaired by these disciplinary fines. Whenever union action has the effect of impermissibly inhibiting an employer with respect to his choice of loyal representatives it is apparent that an express federal labor policy is being violated, and it necessarily follows that the rationale underlying *Allis-Chalmers* and *Scofield* cannot be availed to nullify the section 8(b)(1)(B) violation.

Decision of United States Court of Appeals for the Seventh Circuit in Nation Labor Relations Board, Petitioner v. Local 2150, International Brotherhood of Electrical Workers, AFL-CIO, Respondent. Wisconsin Electric Power Company, Intervenor.

United States Court of Appeals, Seventh Circuit. No. 71-1864. July 13, 1973.

On Application for Enforcement of an Order of National Labor Relations Board.

Cummings, C. J.: The National Labor Relations Board found that the Union[1] violated Section 8(b)(1)(B) of the National Labor Relations Act by disciplining certain company supervisors for performing bargaining unit work during the Union's economic strike. This case arises on the Board's application for enforcement of its order issued pursuant to that finding. The Board's decision and order are reported at [1971 CCH NLRB ¶23,280] 192 NLRB No. 16.

Since the 1930's the Company and the Union have enjoyed a collective bargaining relationship. When their then current two-year contract expired on June 16, 1969, the Union initiated an economic strike which continued until July 1, 1969. During the strike all the Company's supervisors in the categories of those disciplined save one, who was hospitalized at the time, reported for work.

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[1] Local 2150, International Brotherhood of Electrical Workers, AFL-CIO.

The record contains no suggestion that the Company gave the supervisors an option to choose not to cross the picket line.[3] Following the strike the Union preferred charges against 60 supervisors (including the hospitalized one) for doing struck work.[4] All but two of these were holders of union withdrawal cards. A withdrawal card entitles the holder to a very qualified union membership as explained below. After a trial at which none of the charged supervisors appeared, the Union found all guilty except for the hospitalized supervisor and one of the two who did not possess a withdrawal card. The other supervisor not retaining a withdrawal card had his discipline nullified upon appeal to the International Union.

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[3] Although at oral argument before the Board company counsel asserted that the Company had instructed the supervisors to report for work and this is uncontroverted, as the Board noted, that is not explicit in the record. However, unless the Company expressly gave the supervisors an option as to whether to cross the picket lines or not, the Board's case would not be vulnerable. It is such an option which could present a problem in that if the Company left to the supervisors' discretion the decision whether to align themselves with management or with the Union, arguably it might be difficult for the Company legitimately to complain about the Union's compromising the loyalty of these representatives. But see *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, [71 LC ¶ 13, 782]—F.2d—,—, (D.C. Cir. 1972) Slip Op. at 21. (It has also been suggested that whether the supervisors were performing a properly supervisory function might be more debatable. *See id.*,—F.2d at—Slip Op. at 47.) But this record contains not the slightest hint of the Company's giving such an option and, even if there were no direct order, is only reasonably consistent with the Company's expectation that the supervisors would report for work.

[4] The complaint originally involved 61 persons, but the 61st, a safety specialist, was found to be not clearly a statutory supervisor and not to be an employer representative within the coverage of Section 8(b)(1)(B).

The Union imposed on each guilty supervisor a $100 fine and a year's suspension. This sentence was to be suspended on condition that the supervisors were not found guilty of a similar offense for a period of two years, which period extended beyond the expiration of the new collective bargaining agreement.

None of the supervisors here involved were members of the bargaining unit, and the Union did not represent them in bargaining with the Company. Nevertheless, the collective bargaining agreement in force prior to the strike provided that upon an employee's promotion to a supervisory position the Union would give him a withdrawal card if he so requested. Union withdrawal cards are either of the honorary or participating type. Some supervisors involved here held the former; others the latter. Both types carry an exemption for the holder from the dues obligation to the Union and entitle the holder to regain regular membership without fulfilling normal reinstatement requirements. In addition, the holder of the participating withdrawal card is entitled to participate in the pension and insurance benefits of the Union's International Affiliate upon the payment of certain fees. Withdrawal card-holders are denied all other benefits of membership including even the right to attend union meetings, but are subject to the Union's constitution.

The Board agreed with the Trial Examiner that all 60 of the concededly statutory supervisors[5] possessed the authority to adjust grievances and were representatives of the Employer within the meaning of Section 8(b)(1)(B). The Union does not contest this finding. With Member Fanning dissenting, a three-member majority of the Board panel concluded that the Union violated Section 8(b)(1)(B) when it disciplined the supervisors for crossing the picket line and performing struck work. Relying on the general principles of law defining the thrust of

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[5] See Section 2(11) of the Act (29 U. S. C. § 152(11)) for the statutory definition of "supervisor."

Section 8(b)(1)(B) as enunciated in *Lithographers Locals 15-P and 272 (The Toledo Blade Co., Inc.)*, [1969 CCH NLRB ¶ 20,835] 175 NLRB 1072, 1080, enforced, [64 LC ¶ 11,458] 437 F.2d 55 (6th Cir. 1971), which principles the Board found long settled in its decisions and the courts', the Board reasoned:

"Here the supervisors, by doing struck work, as directed, by the Employer, were furthering the interests of the Employer in a dispute not between the Union and the supervisor-union members but between the Employer and the Union. During the strike of the Union, the Employer clearly considered its supervisors among those it could depend on during this period. The Union's fining of the supervisors who were acting in the Employer's interest in performing the struck work severely jeopardized the relationship between the Employer and its supervisors. Thus, the fines, if found to be lawful, would now permit the Union to drive a wedge between a supervisor and the Employer, thus interfering with the performance of the duties the Employer had a right to expect the supervisor to perform. The Employer could no longer count on the complete and undivided loyalty of those it had selected to act as its collective-bargaining agents or to act for it in adjusting grievances. Moreover, such fines clearly interfere with the Employer's control over its own representatives.

"Of course, our decision is not meant to imply that a union is completely precluded from discipling supervisor-union members. It only means that when the underlying dispute is between the employer and the union rather than between the union and the supervisor, then the union is precluded in taking disciplinary action by Section 8(b)(1)(B). The intent is to prevent the supervisor from being placed in a position where he must decide either to support his employer and thereby risk internal union discipline or support the union and thereby jeopardize his posi-

tion with the employer. To place the supervisor in such a position casts doubt both upon his loyalty to his employer and upon his effectiveness as the employer's collective-bargaining and grievances adjustment representative. The purpose of Section 8(b)(1)(B) is to assure to the employer that its selected collective-bargaining representatives will be completely faithful to its desires. This cannot be achieved if the union has an effective method, union disciplinary action, by which it can pressure such representatives to deviate from the interests of the employer.

Accordingly, we find that Section 8(b) (1)(B) has been violated."*

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* Thus the Board agreed with the Trial Examiner's decision as regards those supervisors whose disciplines remained in effect but, contrary to the Trial Examiner, concluded that as regards the two supervisors against whom charges were eventually dropped and the third whose discipline was revoked on appeal, the Union had also violated Section 8(b)(1)(B). It reasoned "[t]he fact that the Union brought charges of misconduct against these supervisors is sufficient to warrant the finding of a violation."

With regard to the Union's merely bringing charges against the one supervisor who did not possess a withdrawal card and in fining the other non-possessor of a withdrawal card, whose discipline was revoked on appeal, the restraint or coercion of the employer is not so clear. Since these supervisors had no cards, since the Union's actions against them were concededly the result of error, and since the Union professes no jurisdiction over them, it is difficult to see how the Company can reasonably be doubtful of their loyalty or how they might in fact be deterred from vigorously representing management's interests in their representative capacities. The situation may be different with respect to the hospitalized supervisor because he did not retain a withdrawal card, and the Union's actions in preferring charges against him served notice on him that had he actually performed his managerial responsibility, the Union would surely have

Section 8(b)(1)(B) of the Labor-Management Relations Act (29 U. S. C. § 158(b)(1)(B)) provides: "It shall be an unfair labor practice for a labor organization or its agents * * * to restrain or coerce * * * an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." The Union raises three principal arguments against the Board's decision that discipline of supervisor-members for performing struck work for the Employer was prohibited by this Section. First, the Union urges that the Section should be interpreted literally so as only to prohibit unions from "restraining or coercing employers—not supervisors—in the selection of representatives for bargaining or grievance adjustment process." Second, it argues that even if Section 8(b)(1)(B) does prohibit union restraint or coercion against employers through the imposition of discipline on supervisor-members (who are concededly representatives of the employer) for their exercise of management responsibilities, it does not reach disciplinary action taken against these persons for their performance of struck work. Third, it contends that the Supreme Court's decision in *NLRB* v. *Allis-Chalmers Mfg. Co.*, [55 LC ¶ 11,972] 388 U. S. 175, demonstrates that the Union's exertion of internal discipline against any members for crossing its picket lines is not restraint or coercion within the meaning of Section 8(b)(1)(B).

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* (continued)
fined him. His loyalty and effectiveness in the future might be undermined. Nevertheless, the Union has not objected to the Board's treating the aborted discipline of any of these three supervisors on the same footing as the discipline of the others. Therefore, we do not actually reach the point, but do put the Board on notice that when the issue is live, the Board's conclusion as to restraint or coercion in similar circumstances will be closely scrutinized.

Each of these arguments was raised and rejected in *International Brotherhood of Electrical Workers* v. *NLRB*, [71 LC ¶ 13,782] — F.2d — (D.C. Cir. 1972).[7] In that case also, the union disciplined supervisors who performed rank-and-file work during an economic strike. We are persuaded by much of Judge MacKinnon's reasoning and consider it largely disposive of the arguments the Union makes on the facts of this case.[8] Although we

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[7] This opinion was prepared before the release of the District of Columbia's *en banc* opinion in *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, [71 LC ¶ 13,782] —— F.2d ——, decided June 29, 1973. In its *en banc* opinion the District of Columbia Circuit also disposed of *National Labor Relations Board* v. *Florida Power & Light Co.*, wherein some of the supervisors disciplined for performing struck work were not included in the bargaining unit, were not represented by the union in bargaining, were only affiliated with the union by virtue of withdrawal cards, and were not shown to have been accorded an express option by the employer as to working during the strike. At the very least, insofar as it reaches an opposite conclusion on these facts, we disagree with the majority opinion therein and are in accord with Judge MacKinnon's dissenting opinion representing the views of himself and Judges Tamm, Robb, and Wilkey. The references herein to the *International Brotherhood of Electrical Workers* opinion refer to the prior panel opinion, —— F.2d —— (D. C. Cir. 1972).

[8] The facts in *International Brotherhood of Electrical Workers* v. *National Labor Relations Board, supra,* are different in several respects from those in this case, and, of course, we intimate no view as to whether the differences call for a different result. In that case, the disciplined supervisors were full union members, were required to be union members under the terms of the union security provision of the collective bargaining agreement, and were members of the bargaining unit. Also, at the inception of the strike, the company expressly told the supervisors that the decision whether or not to respect the picket lines was up to the discretion of each individual foreman.

shall not traverse in detail the same ground he has so thoroughly covered, because the panel in the District of Columbia Circuit was so sharply divided, we shall briefly respond to the Union's arguments and address what we believe to be the critical points of difference between the majority there and Judge Wright in dissent.

The Union's literal interpretation argument was squarely rejected by the Board in *San Francisco-Oakland Mailers No. 18*, 172 NLRB 2173 (1968). In that case the union brought charges against certain supervisor-members for alleged contract violations including the use of an assistant foreman to repair a machine and the permitting of non-union members to do bargaining unit work, and the union fined the supervisors for contempt when they failed to appear before the executive committee. In finding a violation of Section 8(b)(1)(B), the Board stated:

> "• • • Respondent's actions • • • were designed to change the Charging Party's representatives from persons representing the viewpoint of management to persons responsive or subservient to Respondent's will. In enacting Section 8(b)(1)(B) Congress sought to prevent the very evil involved herein—union interference with an employer's control over its own representatives. [Footnote omitted.] That Respondent may have sought the substitution of attitudes rather than persons, and may have exerted its pressure upon the Charging Party by indirect rather than direct means, cannot alter the ultimate fact that pressure was exerted here for the purpose of interfering with the Charging Party's control over its representatives. Realistically, the Employer would have to replace its foreman or face *de facto* nonrepresentation by them." 172 NLRB at 2173.

Without exception the courts which have been faced with the question have interpreted Section 8(b)(1)(B) not merely to prohibit restraint or coercion directly aimed at an employer in his actual selection of his representatives but to forbid pressure against an employer accomp-

lished indirectly by way of disciplinary action leveled against those whom the employer had selected to represent him for their conduct in performing their collective-bargaining or grievance-adjustment functions, which included contract interpretations.[9] We agree that an employer's right to select those representatives whom he chooses would be worthless if the Union could accomplish the functional equivalent of restraining or coercing him in that selection by applying pressure upon those whom the employer has already selected thereto compromise their loyalty. But, like the District of Columbia Circuit, we do not believe Section 8(b)(1)(B) can properly be confined to apply only to union discipline of an employer representative that is based upon his actions on behalf of management regarding a specific disagreement with the Union over the negotiation of a contract term or the proper interpretation of the collective bargaining agreement or the adjustment of a specific grievance. *International Brotherhood of Electrical Workers* v. *National Labor Relations Board, supra,* —— F. 2d ——, Slip. Op. at 14.[10]

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[9] *Dallas Mailers Local 143* v. *National Labor Relations Board,* [65 LC ¶ 11,829] 445 F. 2d 730 (D. C. Cir. 1971); *National Labor Relations Board* v. *Lithographers Local Nos. 15-P and 272,* [64 LC ¶ 11,458] 437 F. 2d 55 (6th Cir. 1971); *National Labor Relations Board* v. *Sheet Metal Workers Local 49,* [63 LC ¶ 11,131] 430 F. 2d 1348 (10th Cir. 1970).

[10] See *Meat Cutters Local 81* v. *National Labor Relations Board,* [67 LC ¶ 12,375] 458 F. 2d 794 (D. C. Cir. 1972) (discipline of supervisor-grievance adjustment representative for carrying out management's order to implement new meat procurement policy); *Nation Labor Relations Board* v. *New Mexico Dist. Coun. of Carpenters,* [67 LC ¶ 12,403] 454 F. 2d 1116 (10th Cir. 1972) (discipline of supervisor-representative for working for an employer who was not making payments into the union's health and welfare fund and who had no working agreement with the union; discipline of supervisor-grievance adjustment representative for co-signing letter urging employees to vote against the union in an upcoming election).

Because they are supervisors, an employer has a right to expect that whether they are union members or not, they will discharge their properly supervisory or managerial responsibilities in the best interests of the company. When the employer has a dispute with the union, and the union disciplines supervisors for performing their supervisory responsibilities on the employer's behalf in that dispute, that discipline "drive[s] a wedge between [the] supervisor[s] and the Employer" and may reasonably be expected to undermine the loyalty and effectiveness of these supervisors when called upon to act for the company in their representative capacities.[11] In this way the union's discipline effects a "substitution of attitudes rather than of persons" and accomplishes the functional equivalent of forcing the employer to select representatives responsive to the union's interests.

In *International Brotherhood of Electrical Workers* v. *National Labor Relations Board, supra,* the dissent did not disagree that Section 8(b)(1)(B) would reach discipline imposed on a supervisor-representative for his exercise of a properly managerial responsibility. *Id.*, —— F. 2d at ——, Slip Op. at 42-45. However, in opposition to the panel majority, Judge Wright felt that the "per-

[11] As the Sixth Circuit stated in a case where supervisors were fined for performing struck work in alleged derogation of the collective bargaining agreement, "[t]his conduct of the union would further operate to make the employees reluctant in the future to take a position adverse to the union, and their usefulness to their employer would thereby be impaired." *National Labor Relations Board* v. *Lithographers Locals Nos. 15-P and 272,* [64 LC ¶ 11,458] 437 F. 2d 55, 57 (6th Cir. 1971). And in *Meat Cutters Local 81* v. *National Labor Relations Board,* [67 LC ¶ 12,375] 458 F. 2d 794, 799 (D. C. Cir. 1972), where the union disciplined a supervisor for implementing the employer's new meat procurement policy, the Court stated, "• • • there would have been serious doubt thereafter as to whether he could represent the Company in a *bona fide* manner against the Union in other matters where their interests were adverse."

formance of ordinary rank-and-file work * * * could not possibly be considered to fall within their [the supervisor's] ordinary managerial responsibilities." *Id.*, —— F. 2d at ——, ——, Slip Op. at 42, 45. We disagree and align ourselves more closely with the panel majority on this point.

We cannot accept the notion that supervisors who perform bargaining-unit work during a strike, at least in the absence of an express option to refuse to cross the picket line, are not exercising a properly supervisory responsibility because "under normal circumstances" that work is the responsibility of rank-and-file employees. *Id.*, —— F. 2d at ——, Slip Op. at 45. What a supervisor's proper functions are when the full complement of employees is at work under the regime of a collective bargaining agreement then in force is not determinative of supervisory responsibility during a strike. Otherwise, with no employees to supervise, many supervisors would simply have no managerial responsibilities during a strike. But it can hardly be doubted that it is an essential part of economical warfare involved in a strike for management to muster its resources in an effort to withstand the union's economic coercion. Equally undisputable, it would seem, is that an employer is not limited to combating a strike only with his pocketbook while the business lies idle. Rather, management has "traditionally" (*id.*) relied upon supervisors, where practicable, to pitch in and perform rank-and-file work in an attempt both to strengthen its bargaining position and to preserve the enterprise from collapse during an adverse economic repercussion following a strike. Insofar as the supervisors work to give the employer added economic leverage, they are acting as members of the management team are expected to act when the employer and union are at loggerheads in their most fundamental of disputes. Indeed, in a real sense they are representing the employer for the purpose of collective bargaining, for "the use of economic pressure by the parties to a labor dispute * * * is part and parcel of the process of collective bargaining." *National Labor Rela-*

tions Board v. *Insurance Agents International Union*, [39 LC ¶ 66,239] 361 U. S. 477, 495. Insofar as their effort helps to keep the business going in order to fulfill commitments to customers and to preserve the company's clientele and good name from deterioration, it lies at the very core of the entrepreneurial function. Assuredly here where the Company is an electric power company, holding a monopoly, its management has an especial obligation to continue to provide an indispensable public service during a time of strike. Accordingly, we think supervisors who act in their employer's interests by performing rank-and-file work during a strike are indeed performing a properly managerial function.

Any suggestion that *National Labor Relations Board* v. *Allis-Chalmers Mfg. Co.*, [55 LC ¶ 11,972] 388 U. S. 175, has controlling significance for this case because the words "restrain or coerce" are common to Sections 8(b)(1)(A) and 8(b)(1)(B) and because in both cases the Unions imposed fines for the performance of struck work (*International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, *supra*, —— F.2d at ——, Slip Op. at 49-54) must be rejected. *Allis-Chalmers* only considered the question whether union fines against employee-members for strikebreaking constituted an unfair labor practice under Section 8(b)(1)(A) as a restraint or coercion of those employees in the exercise of their Section 7 right to refrain from concerted activities.[13] *Id.* at

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[13]Section 8(b)(1)(A) (29 U. S. C. § 158 (b)(1)(A)) provides:

"It shall be an unfair labor practice for a labor organization or its agents • • • to restrain or coerce • • • employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein • • •."

Section 7 (29 U. S. C. § 157) provides in pertinent part:

"Employees shall have the right to • • • engage in • • • concerted activities • • •, and shall also have the right to refrain from any or all of such activities • • •."

176. Here the question is whether the imposition of discipline against supervisor-members for performing struck work is an unfair labor practice under Section 8(b)(1)(B) as a restraint or coercion of the employer in his right to select and retain loyal representatives. Since Sections 8(b)(1)(A) and 8(b)(1)(B) protect different interests, it simply does not follow that discipline which does not amount to restraint or coercion of the employee under the former cannot constitute restraint or coercion of the employer under the latter. The analysis of the employee-members relationship with his union on which *Allis-Chalmers* is predicated is not apposite or adequate when the employer claims that the union's discipline of its members interfered with his protected relationship with his representatives.

In *Allis-Chalmers* the Supreme Court concluded that Congress did not intend in enacting Section 8(b)(1)(A) to regulate internal union affairs to the extent of stripping unions of the power to fine members for strikebreaking (*Id.* at 183), but that says nothing about the proper reach of Section 8(b)(1)(B), by which Congress evidenced a concern to deprive the unions of power to turn the employer's representatives against him. Recently the Supreme Court has explained that the basis of its holding in *Allis-Chalmers* was that Section 8(b)(1)(A) was "not intended by Congress to apply to the imposition of fines not affecting the employer-employee relationship and not otherwise prohibited by the Act." *National Labor Relations Board* v. *The Boeing Co.*, [71 LC ¶ 13,668] —— U.S. ——, ——, 41 U. S. L. W. 4678, 4679. Where, as here, Congress granted express protection to the employer-representative relationship it cannot be said that Congress intended to leave the union as free to discipline its members as it did in enacting Section 8(b)(1)(A).

Accordingly, *Allis-Chalmers* does not control this case. To be sure the Union's interest in enforcing a rule against its members crossing picket lines must be acknowledged, but in our view its enforcement against supervisor-mem-

bers who are employer representatives "impairs [a] policy Congress has imbedded in the labor laws." *National Labor Relations Board* v. *Textile Workers*, 409 U. S. 213, 216; *Scofield*. v. *National Labor Relations Board*, 394 U.S. 423, 430.

The Union also argues that since the Company allowed its supervisors to retain union membership, it thus voluntarily agreed that the Union could exert its discipline over these members. Undoubtedly by permitting employees promoted to supervisory positions to retain withdrawal cards, the Company must be taken to have acquiesced in some union control over those supervisors who requested the cards. But to agree that the Company acceded to some union control hardly means that the Company waived its right to the protection of Section 8(b)(1)(B). Even where employers have agreed to union security provisions requiring supervisors to be full union members, and they were included in the bargaining unit, no waiver of the protection of Section 8(b)(1)(B) has been found. *International Brotherhood of Electrical Workers* v. *National Labor Relations Board, supra*, ... F.2d at ....., Slip Op. at 15-16; *Lithographers Locals 15-P and 272 (The Toledo Blade Co., Inc.)*, [1969 CCH NLRB ¶20,835] 175 NLRB 1072, 1080, enforced [64 LC ¶ 11,458] 437 F. 2d 55 (6th Cir. 1971); see *Meat Cutters Local 81* v. *National Labor Relations Board*, [67 LC ¶ 12,375] 458 F. 2d 794, 796 n. 3 (D. C. Cir. 1972). Whether or not that view is correct, surely no waiver should be found here where the supervisors were not in the bargaining unit and retained only a vestigial membership status entitling them to nothing more than a waiver of reinstatement requirements and, in the case of the participating withdrawal cardholder, certain pension and insurance benefits. Indeed, the logical upshot of the Union's argument is that the Company acquiesced in any discipline the Union might impose on a supervisor for practically anything since the Union's constitution, to which the withdrawal cardholders are subject, makes it an offense to work "in the

interest of any organization or cause which is detrimental to, or opposed to, the I. B. E. W."[13] Furthermore, the withdrawal card, and in turn the Company's agreement that promoted supervisors could request and retain the cards, hardly clear by their own terms, must be construed as ambulatory with respect to changes in the Union's constitution. If the Company waived the protection to which it is entitled under Section 8(b)(1)(B), that waiver must be found in clear and unmistakable terms. See *National Labor Relations Board* v. *Wisconsin Aluminum Foundry Co.*, [64 LC ¶11,514] 440 F. 2d 393, 399-400 (7th Cir. 1971). Since we cannot find such an expression of waiver, the measure of union control over supervisor-members in which the Company acquiesced is only that which is without the reach of Section 8(b)(1)(B).

Accordingly, the Board's order will be enforced.

KILEY, C. J., dissenting: I respectfully dissent, for the reasons so ably and persuasively expressed by Judge Skelly Wright in writing the opinion for the District of Columbia Circuit On Rehearing *En Banc* in *International Brotherhood of Electrical Workers, etc., et al.* v. *National Labor Relations Board*, [71 LC ¶ 13,782] Nos. 71-1558 and 71-1712, decided June 29, 1973.

Relevant Portions Sec. 2 National Labor Relatons Act (29 U.S.C. 152):

When used in this subchapter—

• • •

(3) The term "employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any un-

[13] International Brotherhood of Electrical Workers Constitution, Article XXVII, Section 1.(10).

fair labor practice, and who has not obtained any unfair labor practice, and who not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

• • •

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not a of a merely routine or clerical nature, but requires the use of independent judgment.

• • •

July 5, 1935, c. 372, § 2, 49 Stat. 450; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 137.

Relevant Portions Sec. 8 National Labor Relations Act (29 U.S.C. 158):

(a) It shall be an unfair labor practice for an employer—

• • •

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, main-

tained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

• • •

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 534, § 1(b), 65 Stat. 601; Sept. 14, 1959, Pub.L. 86-257, Title II, § 201(e), Title VII, §§ 704(a)-(c), 705 (a), 73 Stat. 525, 542, 545.

Relevant Portions Sec. 9 National Labor Relations Act (29 U.S.C. 159):

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates to pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter,

the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * * July 5, 1935, c. 372, § 9, 49 Stat. 453; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 143; Oct. 22, 1951, c. 534, § 1(c, d), 65 Stat. 601; Sept. 14, 1959, Pub.L. 86-257, Title II, § 201(d), Title VII, §702, 73 Stat. 525, 542.

Relevant Portion Sec. 14 National Labor Relations Act (29 U.S.C. 164):

(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining. July 5, 1935, c. 372, § 14, 49 Stat. 457; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 151; Sept. 14, 1959, Pub.L. 86-257, Title VII, § 701(a), 73 Stat. 541.

Relevant Portions Labor-Management Reporting and Disclosures Act 1959 (29 U.S.C. 401):

(a) (1) Equal rights.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of speech and assembly.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the

meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations. Pub.L 86-257, Title I, § 101, Sept. 14, 1959, 73 Stat. 522.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-549

BELL SUPERVISORS PROTECTIVE ASSOCIATION (Not a Labor Organization), PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

1. Pursuant to a charge filed by petitioner Bell Supervisors Protective Association ("the Association"), the Board found that the International Brotherhood of Electrical Workers, AFL-CIO, and its affiliated Local 134, violated Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(B), by disciplining foremen-members for performing the work of rank-and-file employees during an economic strike at Illinois Bell Telephone Co. (Pet. App. 30a-33a). The Board, however, refused to amend the complaint to allow the Association to challenge the legality of the union security clause of the collective bargaining contract between the Company and Local 134 (Pet. App. 28a, 20a).

The Association sought review in the United States Court of Appeals for the Seventh Circuit of the Board's refusal to amend the complaint. The Unions, meanwhile,

petitioned the United States Court of Appeals for the District of Columbia Circuit to review the unfair labor practice finding against them. Thereafter, the Seventh Circuit case was transferred to the District of Columbia Circuit, and the two cases were consolidated "for all purposes" (Pet. App. 1a); the Unions' case was numbered 71-1559, and the Association's, 71-1785.

On September 22, 1972, a panel of the District of Columbia Circuit sustained the Board's unfair labor practice finding against the Unions and also its refusal to amend the complaint (Pet. App. 60a-70a, 70a-74a). Pursuant to the Unions' petition, however, the full court withdrew the panel decision, and ordered that No. 71-1559 be reheard *en banc* together with *International Brotherhood of Electrical Workers, Local 642, et al.* v. *National Labor Relations Board, and Florida Power & Light Company,* No. 71-1712, which presented the same issue. On June 29, 1973, the full court, by a 5-4 vote, rejected the Board's unfair labor practice findings in Nos. 71-1559 and 71-1712 (Pet. App. 96a-143a).[1] On the same date, the panel which issued the September 22 decision vacated the consolidation of Nos. 71-1559 and 71-1785,[2] and entered a separate order in No. 71-1785, affirming the Board's refusal to amend the complaint for the reasons set forth in its earlier opinion (Pet. App. 2a).

2. The first question which the Association seeks to present—whether a union may lawfully discipline foremen-

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[1] The Board intends to file a petition for a writ of certiorari to review the adverse *en banc* decision in both Nos. 71-1559 and 71-1785. Florida Power & Light Company has already filed a petition to review that decision in 71-1785. *Florida Power & Light Company* v. *International Brotherhood of Electrical Workers, Local 642, et al.*, No. 73-556.

[2] A copy of this order is set forth in the Appendix, *infra*, p. .

members for refusing to perform rank-and-file work during a strike—is the same question which the Board intends to present in its petition, and which is also the subject of the petition filed by *Florida Power & Light Company*, No. 73-556 (n. 1, *supra*). Accordingly the Board does not oppose the Association's petition, limited to the first question. We point out, however, that the Association may not have standing to raise that question. In the court of appeals, the Association did not intervene in the Unions' review proceeding, No. 71-1559, and the mere fact that its proceeding, No. 71-1785, was originally consolidated with No. 71-1559 would ordinarily not be sufficient to make the association a party in No. 71-1559. 5 *Moore's Federal Practice* (2d ed. 1971), par. 42.02.

3. The Association's second question—whether the Board properly refused to amend the complaint—does not warrant further review. On the facts of this case, the Board's action was reasonable and in accord with settled principles.

a. In May 1968, the Association filed with the Board's Regional Office an unfair labor practice charge alleging that the union security clause of Illinois Bell's collective bargaining agreement with Local 134 was unlawful because the unit which it covered included both supervisors and non-supervisors (A. 201).[3] The Regional Director refused to issue a complaint on this charge and his refusal was upheld by the General Counsel on appeal (A. 202).[4] Thereafter, in June 1969, the Association

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[3] "A." refers to the appendix to the briefs in the court below.

[4] The General Counsel concluded: "The inclusion of alleged supervisors in the unit by voluntary agreement of the contracting parties did not, standing alone, constitute an unfair labor practice, nor did it render such unit inappropriate for coverage by an otherwise valid union security clause" (Pet. App. 46a, n. 8).

initiated the instant case; neither its charge nor the subsequent complaint issued by the Regional Director referred to any alleged illegality of the union security clause. On the afternoon of the final day of the four-day unfair labor practice hearing, however, the Association sought to amend the complaint to add this new allegation (A. 184-185, 147-150). Counsel for the General Counsel did not join or consent to the Association's motion to amend the complaint. The Board upheld the Trial Examiner's refusal to amend the complaint (Pet. App. 20a-21a, 28a), and the court of appeals found that the Board had not abused its discretion (Pet. App. 70a-74a).

b. Under Section 3(d) of the Act, 29 U.S.C. 153(d), the General Counsel of the Board "has unreviewable discretion to refuse to institute an unfair labor practice complaint." *Vaca* v. *Sipes*, 386 U.S. 171, 182. Accordingly, an amendment of the complaint in a Board proceeding is ordinarily barred, unless the General Counsel consents. See, *e.g.*, *National Maritime Union of America, AFL-CIO* v. *National Labor Relations Board*, 423 F. 2d 625, 626 (C.A. 2); *United Steelworkers, etc.* v. *National Labor Relations Board*, 393 F. 2d 661, 664 (C.A. D.C.); *National Labor Relations Board* v. *Raytheon Co.*, 445 F. 2d 272, 274 (C.A. 9).[5]

[5] *National Labor Relations Board* v. *Sterling Furniture Co.*, 202 F. 2d 41 (C.A. 9), and *Frito Co.* v. *National Labor Relations Board*, 330 F. 2d 458 (C.A. 9), relied upon by the Association (Pet. 10), are inapposite. In *Sterling*, 202 F. 2d at 43-44, the General Counsel expressly joined in the proposed amendments. Contrary to the Association's suggestion (Pet. 4), counsel for the General Counsel did not consent to the amendment here (Pet. App. 46a; A. 147-150). Similarly, in *Frito*, the General Counsel permitted the introduction of evidence raising the issue in question without objection, thereby constructively consenting, the court held (330 F. 2d at 465), to the proposed amendment. Here the Examiner found that the issue sought to be raised had not been litigated in the proceeding (A. 149). Moreover, of course, only one of the two parties to the collective bargaining agreement was a party in the unfair labor practice proceedings.

The petition for a writ of certiorari should be denied with respect to question 2. We do not oppose the petition with respect to question 1.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

NOVEMBER 1973.

APPENDIX

SEPTEMBER TERM, 1972

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1559

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, AND LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 71-1785

BELL SUPERVISORS PROTECTIVE ASSOCIATION (NOT A LABOR ORGANIZATION), PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

BEFORE: Wright and MacKinnon, Circuit Judges; and *Matthews, United States Senior District Judge for the District of Columbia.

ORDER

IT IS ORDERED, *sua sponte,* that the consolidation of the above entitled cases is hereby vacated.

Per Curiam

Filed June 29, 1973

HUGH E. KLINE,
Clerk.

• Sitting by designation pursuant to Title 28 U.S.C. §294(c).

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CITATIONS

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Decision and Order of the National Labor Relations Board is reported at 192 NLRB No. 17, and appears at App. Pet. 26a. The opinion of the panel of the Court of Appeals dated September 22, 1972, not yet officially reported, appears at App. Pet. 41a. The opinion of the Court of Appeals for the District of Columbia Circuit, sitting *en banc,* dated June 29, 1973, appears at App. Pet., 95a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Does a Union restrain or coerce an employer in the selection of its collective bargaining or grievance adjustment representatives, in violation of Section 8(b(1)(B) of the National Labor Relations Act, by disciplining foremen-members for performing rank-and-file employees' work during a lawful strike against their employer, and for forming a protective association to advance the alleged rights of the foremen during the course of that strike?

2. Whether the Trial Examiner, affirmed by the National Labor Relations Board, abused his discretion by denying the charging party's motion, made at the conclusion of the hearing before him, to amend the complaint issued by the Labor Board's General Counsel, where the proposed amendment would have raised a different issue involving a separate section of the Act from that tried before the Trial Examiner, and where the General Counsel not only did not consent to the proposed amendment, but had previously refused to issue a complaint on a separate charge filed

by the same charging party raising the same issue encompassed by the proposed amendment?

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, 61 Stat. 136, 29 U.S.C. §151, *et seq.*, Sections 2(3), 2(11), 8(b)(1) and 14(a), are set forth at App. Pet. 180a-184a.

STATEMENT OF THE CASE

The principal facts are essentially undisputed and are accurately set forth in the decision of the Labor Board. In brief, Local 134 has been in contractual relationship with Illinois Bell Telephone Company and its predecessors since approximately 1909. It represents within its bargaining unit both employees as defined in Section 2(3) of the Act and foremen and general foremen found by the Board to be supervisors within the meaning of Section 2(11) of the Act. In all contracts since 1948, these foremen, as well as all other employees covered by the contract, have been required, as a condition of employment, to become and remain members of the Union after 30 days of employment. (J.A. 175-179.)[2] All IBEW members, including the foremen, take an oath of obligation to conform to and abide by the IBEW Constitution and to bear allegiance to the IBEW and its interests. (J.A. 187, 206.)

From May 8, 1968 until September 20, 1968, members of Local 134, and other local unions affiliated with the IBEW, were engaged in a lawful economic strike against Illinois Bell Telephone Company. In the

[2] References to "J.A." are to the Joint Appendix filed by the parties with the Court below.

MISSING PAGES

below affirmed the Board on that issue, with a modification not here pertient, by a 2-1 vote, and unanimously affirmed the denial of the motion to amend. On rehearing, *en banc,* the Court of Appeals reversed the Board's finding of a violation of Section 8(b)(1)(B), by a 5-4 vote.[3]

ARGUMENT

1. RESPONDENTS DO NOT OPPOSE THE GRANTING OF A WRIT OF CERTIORARI IN QUESTION NO. 1.

It is the position of Respondents that the decision of the Court of Appeals is clearly correct, in that it correctly interprets both the language of the Act and the pertinent legislative history and does so in a manner consistent with this Court's decisions in *NLRB* v. *Allis-Chalmers Manufacturing Company, supra.,* and *Scofield* v. *NLRB,* 394 U.S. 423. Nevertheless, Respondents recognize that this question presented is one of major importance in the administration of the National Labor Relations Act, and is one on which the Courts of Appeals have divided. The result below is

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[3] On rehearing, *en banc,* the Court consolidated the instant case with that of *IBEW Locals 641, 622, 759, 820 and 1263* v. *NLRB and Florida Power and Light Company.* A Petition for a Writ of Certiorari, filed by Florida Power and Light Company, is presently pending before the Court as No. 73-556. Although the question presented in that case is the same as that presented by Question No. 1 in the instant case, the statement of the question presented at page 2 of the Petition there is imprecise. Thus, as the Question Presented by Petitioner herein correctly states, the issue is whether a union may discipline foremen-members for performing *rank-and-file employees' work* during a strike; not whether the union may discipline supervisors, who are union members, who perform "Company" work during a strike. (Page 2 of Petition in No. 73-556.)

the same as that reached by the United States Court of Appeals for the Ninth Circuit, *NLRB* v. *San Francisco Typographical Union No. 21,* F.2d , 83 LRRM 2314 (May 18, 1973). On the other hand, the United States Court of Appeals for the Seventh Circuit reached the opposite result, affirming the holding of the Labor Board on the same issue in a companion case and declining to follow the majority *en banc* opinion of the D.C. Circuit. *NLRB* v. *Local 2150, International Brotherhood of Electrical Workers, AFL-CIO,* F.2d , 83 LRRM 2827 (July 13, 1973).[4]

Under the above circumstances, the Respondents agree that review by this Court of Question No. 1 would be appropriate.

2. THE WRIT SHOULD BE DENIED ON QUESTION NO. 2.

A. There Is No Conflict of Decision Among the Courts of Appeals.

It is sufficient to note that, not only is there no conflict between the Courts of Appeals on Petitioner's Question No. 2, the Petition does not even contend that such a conflict exists. Indeed, as shown in Part C, *infra.*, the decision of the Court of Appeals for the District of Columbia Circuit is in accord with two of the principal cases cited by Petitioner, *NLRB* v. *Sterling Furniture Company,* 202 F.2d 41 (9th Cir. 1953), and *Frito Company* v. *NLRB,* 330 F.2d 458 (9th Cir. 1964).

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[4] We are advised by counsel for IBEW Local 2150 that they intend to file a Petition for a Writ of Certiorari to the Seventh Circuit in that case. Following the Seventh Circuit's denial of a motion for rehearing, *en banc,* the petition in that case will be due early next month.

MISSING PAGES

Nor do *Sterling Furniture Company* or *Frito Company, supra,* support Petitioner's position. In *Sterling,* the General Counsel joined in the proposed amendment. Here, Counsel for the General Counsel did not join or consent to the Association's motion to amend the complaint. Further unlike this case, the legality of the contract there was in issue throughout the case. In *Frito,* the General Counsel raised no objection to the amendment, which was a narrow one: the inclusion of two additional, and interrelated, subsections of a single subcontracting clause in the allegation that the other subsection of the same clause violated Section 8(e) of the Act. Indeed, the Court in *Frito* specifically noted that, in the circumstances of that case, the amendment of the complaint would not have usurped the authority of the General Counsel. Here, that would have been the precise effect of the granting of the Association's motion. As the Court added in *Frito*:

> "It is well established that the Board is not empowered to allow amendments to the complaint which the General Counsel has rejected. These are amendmnts proposed by other parties than the General Counsel and were it possible for them to impose amendments to the complaint, the final authority of the General Counsel to issue complaints would be circumvented. The authority to issue complaints is authority to determine what they shall contain." (330 F.2d at 464.)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari on Question No. 2 should be denied. The Petition for a Writ on Question No. 1 is not opposed.

Respectfully submitted,

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November, 1973

No. 73-549

DEC 4 1973

MICHAEL RODAK, JR., CL

In the

Supreme Court of the United States

OCTOBER TERM, 1973

BELL SUPERVISORS PROTECTIVE ASSOCIATION
(Not a Labor Organization), Petitioner

vs.

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The United States Court of Appeals For
The District of Columbia Circuit

REPLY OF BELL SUPERVISORS PROTECTIVE ASSOCIATION TO MEMORANDA OF NATIONAL LABOR RELATIONS BOARD AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

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IN THE

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On Petition For A Writ of Certiorari To
The United States Court of Appeals For
The District of Columbia Circuit

REPLY OF BELL SUPERVISORS PROTECTIVE ASSOCIATION TO MEMORANDA OF NATIONAL LABOR RELATIONS BOARD AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

The Unions and the Labor Board would have the Petition denied as to the second question presented, i.e., whether the Board can rightfully refuse to pass upon a question apparent on the face of the record the General Counsel made—the legality of a union shop imposed upon an inappropriate bargaining unit.

Whether an important administrative agency may, for baseless, asserted "procedural" reasons, find it "inadvis-

able" to notice a blatant violation of law, is an important federal question as to the limits of administrative discretion.

The permission given by the District of Columbia to the Board to evade its duty is flatly contrary to the 8th Circuit's decision that the Board has a duty to decide material issues even though not specifically pleaded (*American Boiler Mfgr's Assoc.* v. *N.L.R.B.*, 404 F 2d 547, 556, 8 Cir. 1968), the 5th Circuit's view that avoidance of a hard issue is an abuse of discretion (*Connell Construction Company, Inc.* v. *Plumbers and Steamfitters Local Union No. 100*, Aug. 22, 1973, ... F 2d ....., 72 LC ¶13,911) and the 9th Circuit's views on the duty of a Trial Examiner or the Board to amend a complaint to conform to evidence voluntarily introduced without objection (*Frito Company* v. *N.L.R.B.*, 330 F 2d 458, 465, 9 Cir. 1964; *N.L.R.B.* v. *Sterling Furniture Co.*, 202 F 2d 41, 44, 9 Cir. 1953).

There are factual errors in the Memoranda for the Unions and the Board that require correction:

1. Both Memoranda inaccurately state that "The Association sought to amend the Complaint." But as the Examiner found, "***[T] Charging Party disclaimed any power on its part to amend the Complaint, but pointed out that such power resides in the Trial Examiner and in the Board ***." (Pet. 20a) There is no doubt that the Examiner and the Board have the power and duty to amend where the proofs voluntarily introduced without objection show a patent violation of the law which it is the Board's sworn duty to correct.

2. Footnote 5 of the Memorandum for the Board erroneously states that "***only one of the two parties to

the collective bargaining agreement was a party in the unfair labor practice proceedings." The Solicitor General has overlooked that Illinois Bell was given leave to enter the proceedings. It appeared by Paul J. Furlong (A. 66) who examined witnesses and participated fully. Neither he nor counsel for the General Counsel objected to Bell Supervisor's motion that the complaint be amended.

3. Both Memoranda argue that "Counsel for the General Counsel did not join or consent to the Association's Motion to Amend the Complaint." If failure to object is not *explicit*, it certainly is *implicit* consent.* Moreover, counsel for the General Counsel was the one who put in (without objection from the unions) nearly all of the evidence that justified the Motion to Amend the Complaint to Conform to the Proof.

4. Both Memoranda imply that for the Trial Examiner to have amended the complaint to allege that the union shop contract was illegal, would be to overrule the General Counsel's action of a year earlier in refusing to issue a complaint against Illinois Bell while the strike was in progress and before the supervisors had been fined. That veiled argument is stretched too far. The General Counsel's decision not to prosecute at one time does not preclude a decision to prosecute another party at a later time on established, rather than threatened, facts. The General Counsel did not object to the motion to amend. Appeal counsel cannot do it for him.

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*Note that the 9th Circuit in *Frito Co.* v. *National Labor Relations Board*, 330 F 2d 458, treated the action of the General Counsel in putting in evidence *dehors* the complaint as constructive consent that the complaint be amended.

5. Both Memoranda point out that Bell Supervisors' motion was made on the last day of the hearing. That is when a motion to conform pleadings to proof is usually made. Such a motion cannot be made before trial. More importantly, neither Memorandum even hints how any party would have been prejudiced legally had the Complaint been amended. The time for submitting briefs had not arrived and no one claimed (or yet claims), to have additional relevant evidence that would avoid the legal transgression. Thus this Court is presented with the naked question of whether an administrative tribunal has allowable discretion to evade an important question, fairly presented. The Board is supposed to enforce the law—not to duck it. It should be so told, as the 5th, 8th and 9th Circuits have tried to tell it.

6. The Memorandum for the Board hints, without taking a position, that although Bell Supervisors' Petition should be granted on question No. 1, that perhaps Bell Supervisors may not have standing to raise the question because it did not intervene in the Union's review proceeding, No. 71-1559. The Memorandum suggests that the fact that No. 71-1785 was originally consolidated with No. 71-1559 would not ordinarily be sufficient to make the Association a party in No. 71-1559, citing paragraph 42.02 of Moore's Federal Practice. There is nothing in Moore bearing upon the unique situation in which two parties seek review of the same Labor Board order, virtually simultaneously, but in different Circuits, the later filed proceeding is transferred to the Circuit first acquiring jurisdiction and the proceedings consolidated *"for all purposes."* There is no broader or more sweeping consolidation than one "for all purposes." The notion that to participate fully in a case so consolidated a party must

file a separate intervention petition is a disservice to simplified judicial procedure.*

Respectfully submitted,

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*In our Petition for Certiorari we stated (p. 2) that the consolidation order had never been vacated. We so believed erroneously. Either through error in the Clerk's office or a failure of the Postal Service the order of June 29, 1973 vacating the consolidation order never reached the undersigned. We first saw a copy of it in the Solicitor General's present Memorandum.